

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Qwest Communications International Inc.,)	
Consolidated Application for Authority to)	
Provide In-Region, InterLATA Services in)	WC Docket No. 02-189
Montana, Utah, Washington, and Wyoming)	
)	
)	

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FCC ORDERS CITED

SHORT CITE	FULL CITE
<i>BellSouth Louisiana II Order</i>	Memorandum Opinion and Order, <i>Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana</i> , 13 FCC Rcd. 20599 (1998)
<i>Georgia/Louisiana 271 Order</i>	Memorandum Opinion and Order, <i>Joint Application of BellSouth Corporation et al. for Provision of In-Region InterLATA Services in Georgia and Louisiana</i> , CC Docket No. 02-35 (rel. May 15, 2002)
<i>Connecticut 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New York, Inc. et al., for Authorization to Provide In-Region InterLATA Services in Connecticut</i> , CC Dkt. No. 01-100 (rel. July 20, 2001)
<i>Inputs Order</i>	Tenth Report and Order, <i>Federal-State Joint Board on Universal Service</i> , 14 FCC Rcd. 20156 (1999)
<i>KS/OK 271 Order</i>	Memorandum Opinion and Order, <i>Joint Application of SBC Communications, Inc., et al. for Provision of In-Region InterLATA Services in Kansas and Oklahoma</i> , 16 FCC Rcd. 6237 (2001)
<i>Local Competition Order</i>	First Report and Order, <i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , 11 FCC Rcd. 15499 (1996), <i>aff'd in part and vacated in part by Iowa Utils. Bd. v. FCC</i> , 120 F.3d 753 (8th Cir. 1997), <i>aff'd in part and rev'd in part by AT&T Corp. v. Iowa Utils. Bd.</i> , 119 S. Ct. 721 (1999)
<i>Massachusetts 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Massachusetts</i> , 16 FCC Rcd. 8988 (2001)
<i>Michigan 271 Order</i>	Memorandum Opinion and Order, <i>Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan</i> , 12 FCC Rcd. 20543 (1997)
<i>New Jersey 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in</i>

SHORT CITE	FULL CITE
	<i>New Jersey</i> , WC Docket No. 02-67 (rel. June 24, 2002)
<i>NY 271 Order</i>	Memorandum Opinion and Order, <i>Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York</i> , 15 FCC Rcd. 3953 (1999)
<i>Pennsylvania 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania</i> , 16 FCC Rcd. 17419 (2001)
<i>Platform Order</i>	Fifth Report and Order, <i>Federal-State Joint Board on Universal Service</i> , 13 FCC Rcd. 21323 (1998)
<i>South Carolina 271 Order</i>	Memorandum Opinion and Order, <i>Application of BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in South Carolina</i> , 13 FCC Rcd. 539 (1997)
<i>Texas 271 Order</i>	Memorandum Opinion and Order, <i>Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas</i> , 15 FCC Rcd. 18354 (2000)
<i>Vermont 271 Order</i>	<i>Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Vermont</i> , CC Docket No. 02-7 (rel. April 17, 2002)

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COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") respectfully submits these comments in opposition to Qwest's application for authorization to provide in-region, interLATA services in Montana, Utah, Washington, and Wyoming.

With the ink barely dry on its initial five-state application for interLATA authority, Qwest now seeks authority in four more states. Qwest has not materially changed its behavior in the intervening weeks, and this follow-on application suffers from nearly all the fatal defects of its predecessor. Because review of key issues by states and third parties remains grossly incomplete, this application, like the first, is a pastiche of stopgap remedies (*e.g.*, last-minute rates and terms that have never been reviewed) and clumsy efforts to fob off basic section 271 problems until some future proceeding (*e.g.*, Qwest's discriminatory secret deals) or ignore them entirely (*e.g.*, third party testing deficiencies that remain unresolved because Qwest refused further testing).

But these issues cannot be evaded by deferring or ignoring them. Qwest stands alone from other 271 applicants in its long and shameful record of blatant section 271 violations – violations that defy Qwest's express representations to the Commission, that began the minute Qwest swallowed US West, and that continue unabated today. No prior applicant has generated so many serious and well-publicized questions about (and ongoing investigations of) its candor to regulators and to the public. No prior applicant has been revealed to have been leading a double life, claiming full compliance

with the statute while entering patently discriminatory secret deals to silence critics and evade informed state commission, Commission and third party review of its compliance with the core section 271 checklist requirements. And the shocking new developments since Qwest's initial application—criminal investigations, Qwest's admission that it improperly inflated its profits by *more than \$1 billion* while senior officers of the company made off with nearly half that much, and Qwest's continuing downward financial spiral—underscore the pressing need for searching scrutiny of Qwest's applications.

In this time of national resolve to establish and mandate corporate responsibility through effective government oversight, the Commission must find the resolve to insist that Qwest comply fully with section 271. That would be the proper course even if Qwest had sought interLATA authority in only a single state, but the peril of Commission abdication is particularly stark here. In a transparent effort to obtain approval before complete testing, performance data and state and federal civil and criminal investigations expose even more problems, Qwest seeks an unprecedented nine-state stamp of approval that, if granted, would destroy its incentives to complete the process of opening its local markets to competition. But it is quite clear that Qwest has not met its burden to justify interLATA authority in any of the nine states.

The Commission's review can begin and end with Qwest's ongoing, deliberate, and region-wide pattern of secret, discriminatory and illegal interconnection agreement terms with selected CLECs. To create the illusion that local markets have been opened to competition, Qwest has secretly promised favorable terms to carriers that pose little threat to its core market dominance in return for those carriers' promises not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest. While carriers with the resources to pose a real threat to Qwest's local monopolies are kept at bay with unfavorable terms, Qwest points to the fake competition created by these corrupt deals as evidence that its markets are open to competition (and that it has satisfied Track A).

The web of discrimination that built this Potemkin village is an obvious violation of Checklist Item 2, which requires Qwest to prove that it is providing “access” to its network facilities on terms and conditions that are “nondiscriminatory,” 47 U.S.C. § 271(c)(2)(B)(ii). There is no way to place the adjective “nondiscriminatory” before the secretly preferential price and non-price terms and conditions that Qwest has offered to its CLEC co-conspirators. Qwest’s failure to disclose to the Commission all (or, indeed, *any*) of the discriminatory terms of its many secret deals also deprives the Commission of any rational basis for concluding that Qwest has satisfied the seven other checklist items that incorporate nondiscrimination requirements. And, because Qwest’s pattern of discriminatory, anticompetitive and unlawful conduct goes directly to the core issue of whether Qwest’s local markets are open and likely to remain so, the secret deals also preclude any finding that granting the requested interLATA authority is in the public interest.

Qwest’s failure even to mention these serious deficiencies—which commenters raised and documented in response to Qwest’s first Application—betrays Qwest’s recognition that it cannot meet its checklist and other burdens if its secret deals are scrutinized. That is why Qwest filed a frivolous petition seeking a declaration that Qwest’s failure to file its secret interconnection agreements with state commissions did not violate section 252. Qwest cannot seriously hope to prevail in that proceeding; by its plain terms, section 252 requires Qwest to file “[a]ny” interconnection agreement it adopts by negotiation, 47 U.S.C. §§ 252(a), (e), and not merely some, or selected passages of, such agreements.¹ Rather, the declaratory order proceeding is a ploy to stall for time by persuading the Commission to ignore the mounting evidence of secret deals until *after* the Commission has ruled on the Section 271 applications. The Commission cannot lawfully do so. There is no possible resolution of the section 252 interconnection agreement *filing* issues raised in the declaratory order proceeding that could erase Qwest’s *discrimination* in offering special terms to its secret deals partners that are not available to other requesting carriers. And nothing that the

Commission could do in the declaratory order proceeding could eliminate the Commission's clear duty to consider Qwest's pervasive discrimination in determining whether Qwest has met its burden to demonstrate that it meets the checklist nondiscrimination requirements.²

Qwest's tactic of buying off CLECs that otherwise might have alerted regulators to Qwest's failure to adhere to the Act's market opening requirements has corrupted other elements of the section 271 process as well. Also tainted, for example, are the performance and other test data on which Qwest's Application relies. The only way now to ensure that Qwest satisfies the statutory preconditions to interLATA authority is for state commissions to conduct comprehensive investigations, to force Qwest to come clean about all of its secret deals and to reform its discriminatory practices, and then to restart the section 271 process with full participation by all interested parties.³

As the secret deals evidence continues to mount, state commissions are beginning to recognize this. *See, e.g.,* Letter of Arizona Corporation Commissioner Jim Irvin to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) ("any further movement by the Commission on Qwest's Section 271 application must be suspended until the issues related to the compromised agreements are resolved") (Attachment 1 hereto).⁴ But whatever course the states decide to take, this Commission has only one course: to find that Qwest has not met its burden of demonstrating compliance with the checklist nondiscrimination requirements.

Beyond the secret deals, Qwest has failed to meet its checklist burden in many other respects. Qwest's claim that it has met its checklist item 2 burden to prove that network element rates in all

¹ *See Petition For Declaratory Ruling Of Qwest Communications International, Inc.*, WC Docket No. 02-89 (filed Apr. 23, 2002); *Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc.*, WC Docket No. 02-89, at 6-10 (filed May 29, 2002).

² *See, e.g., Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

³ Qwest's recent statement that it will file some of its heretofore secret agreements in the future is too little and far too late to address the irreparable problems in the regulatory record. *See* Qwest Reply Comments at 130, Docket No. 02-148 (filed July 29, 2002).

⁴ *See also id.* ("What makes this situation unique is the subversive nature of these actions and their potential to taint the public deliberative Section 271 review process. Who knows what the outcome of the proceedings would have been if ALL parties of interest had fully participated?").

four states are appropriately forward-looking and comply with the Commission's TELRIC rules, for example, is nonsensical. Qwest's Washington switching rates are based on *Verizon-specific embedded* cost data from 1994. The Utah state commission rejected Qwest's recurring cost models as non-TELRIC, but ultimately adopted recurring rates that are based on those cost models. The Wyoming commission initially tried to set cost-based rates, but under Wyoming state law, the incumbent carrier is permitted to reject rates adopted by a state commission. Qwest invoked this right, and ultimately obtained much higher UNE rates from the beaten down Wyoming commission. And the stipulated rates in Montana contain the express disclaimer that "[n]o party's position in this docket is accepted by the other parties by virtue of their entry into this Stipulation, nor does it indicate their acceptance, agreement or concession to any rate-making principle, cost of service determination, or pricing principle embodied, or arguably embodied, in this Stipulation." Recognizing that the approved rates in these four states cannot seriously be defended, Qwest makes only a token effort to do so.

Instead, Qwest claims that its rates in Montana, Utah, Washington, and Wyoming deserve the TELRIC stamp of approval because of arbitrary 11th-hour reductions recently filed by Qwest that supposedly reduced the rates to Colorado "benchmark" levels. This claim is remarkably presumptuous: the Commission has never approved Qwest's rates in *any* state. Moreover, Qwest's Colorado UNE rates are a moving target. Only days ago, Qwest conceded that its Colorado rates were inflated by clear TELRIC errors and has promised to file a new SGAT with new rates at some time in the next few weeks.

In any event, even if Qwest's Colorado rates could somehow be found TELRIC compliant—and they cannot—Qwest's Montana, Utah, Washington and Wyoming rates, even *after* their recent arbitrary reductions, are still much higher, on a cost-adjusted basis, than Qwest's Colorado rates. Qwest's contrary claim is based upon wildly flawed cost comparisons that imply considerable disdain for the Commission's review process. Qwest's comparisons mask the fact that its deaveraged loop rates are not remotely cost-based, and Qwest's non-loop rates reflect national average minutes of use

assumptions rather than state-specific assumptions that mask important cost and rate differences. When the benchmarking comparisons are done properly, it is clear that Qwest's rates in the other states are, in fact, substantially *higher*, on a cost-adjusted basis, than its Colorado rates.

But Qwest's benchmarking claim would fail even if the other four states' rates did compare favorably to Colorado rates, because the Colorado rates are not TELRIC-compliant. To the contrary, Qwest's loop and non-loop UNE rates are all substantially inflated by clear TELRIC errors. And Qwest's Colorado non-recurring charge methodology was so bloated with improper manual processing and other phantom cost assumptions that it has produced, among other anomalies, hot cut rates that are facially absurd, ranging from \$60 to \$170. For these and other reasons detailed below, Qwest has not satisfied its checklist item 2 burden with respect to rates in Colorado, much less with respect to the four states it attempts to justify by comparison to Colorado.

Qwest has also failed to show that it is providing nondiscriminatory access to operations support systems ("OSS"). Qwest relies almost entirely on the "ROC" test conducted by KPMG Consulting – describing KPMG's test as "determinative" of OSS-related issues – even though the Commission has repeatedly held that actual commercial usage data is far more probative in assessing whether a BOC is providing critically important parity of access to OSS. The data on actual commercial usage generated by even the anemic competitive entry to date prove that Qwest is not providing parity of access in the real world. For example, Qwest's systems reject nearly one-third of all CLEC orders. In some of the States at issue in this application, more than 50 percent of orders that are not rejected fall out for manual processing.

The KPMG test data fail for other reasons as well. KPMG concedes that in conducting tests that covered *every* OSS function, from pre-ordering to maintenance and repair, it relied upon representations and data obtained from CLECs who were receiving preferential "secret deals" treatment from Qwest. Although Qwest's preferential treatment of these CLECs unquestionably skewed the test reports of Qwest's performance, KPMG and the ROC Executive Committee refused

even to *consider* the scope and magnitude of the impacts. The KPMG test results obviously cannot be deemed reliable indicia of Qwest's actual real world performance.

In any event, the results of the KPMG testing, which Qwest cut short in its zeal to file the Application, undermine, rather than support, Qwest's claim of checklist compliance. KPMG's Final Report finds numerous deficiencies in Qwest's OSS in critically important areas. As KPMG found, not only is there far too little evidence to show that Qwest has adhered with its current "redesigned" change management process over time, but both of Qwest's test environments are seriously defective. As KPMG recognized in its Final Report, Qwest has an unacceptably high error rate in manually processing orders. Together, with Qwest's unreasonably high order reject rate, these deficiencies substantially impair CLECs' ability to compete by delaying the return of order status notices and the provisioning of service to CLEC customers, while increasing the likelihood of errors in the provisioning of CLEC orders. Qwest's own reported data likewise show that repeat trouble report rates are higher for CLEC customers than for Qwest's own retail customers. And, as KPMG found, Qwest has also failed to show that it performs repairs for CLECs in a satisfactory manner. Qwest's OSS are plainly discriminatory.

Qwest has not met its burden of demonstrating checklist compliance in a number of other respects as well. Qwest's terms and conditions are blatantly unreasonable and discriminatory. Qwest levies a non-cost-based, wholly unjustified "entrance facility" charge on interconnection that grossly inflates the cost of interconnection and effectively denies CLECs interconnection at their selected point. Qwest imposes large financial penalties on CLECs that fail to meet Qwest's arbitrary 50-percent trunk utilization requirement – a requirement that Qwest itself need not and does not meet. And Qwest restricts efficient interconnection by requiring CLECs to place interconnection traffic on separate trunk groups, and by arbitrarily limiting the length of interconnection trunks. These anticompetitive restrictions severely deter facilities-based entry by driving up the cost of the facilities that CLECs must have to interconnect with Qwest's network.

Qwest further obstructs competitive entry by denying CLECs nondiscriminatory access to unbundled network elements. For example, Qwest retains discretion to refuse to build new facilities to provision CLEC UNE orders, and to delay fulfillment of those orders, when Qwest itself would build the needed facilities if the end-user ordered service directly from Qwest.

With regard to individual network elements, Qwest denies CLECs reasonable access to unbundled local transport by imposing non-distance-sensitive charges that plainly conflict with the Commission's rules. Qwest imposes unlawful restrictions on the availability of unbundled local switching for customers with three or fewer lines in a single location, and limits the availability of packet switching to one degraded form. Qwest also unfairly restricts access to dark fiber, and imposes limitations that effectively deny CLECs any access to the network interface device. These restrictions all serve to insulate Qwest from meaningful local competition and underscore how far Qwest remains from fully implementing its checklist obligations.

Qwest also falls far short of its burden to establish, based upon record evidence, and not merely paper promises, that Qwest and its separate long distance affiliates, if granted interLATA authority, would comply with the section 272 nondiscrimination requirements that the Commission has recognized are "of crucial importance" in ensuring "a level playing field."⁵ Qwest's section 272 declarations consist almost entirely of promises. Indeed, the declarations are virtually identical to Qwest's submissions in Minnesota, where an administrative law judge ruled that Qwest has failed to meet its burden to establish *six* of the fundamental section 272 requirements, including the core requirements that the BOC and its long distance affiliates operate independently, have separate officers and directors, deal with each other only on an arms' length basis, disclose their transactions, treat each other and all other carriers on a nondiscriminatory basis, and comply with joint marketing restrictions.⁶ The Application acknowledges past noncompliance with Section 272, and, as detailed

⁵ See 47 U.S.C. § 271(d)(3)(B); *Texas 271 Order* ¶ 395.

⁶ See *Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272)*, *Minnesota Pub. Util. Comm.*, Findings of Fact and Conclusions of Law and Recommendations, PUC Doc. No. P-421/C1-01-1372 (Mar. 14, 2002).

below, that section 272 noncompliance is but a small part of a much broader pattern of section 271-related noncompliance. On this record, with both a long history of past noncompliance and the Minnesota findings of *current* noncompliance, Qwest's promises of future compliance, many of which are supported by no documentary evidence, are patently inadequate and provide an "independent ground[] for denying [this] Application." *New York Order* ¶ 402.

Finally, even if the Commission could rationally find that Qwest has fully implemented its obligations under the competitive checklist, the record here precludes any finding that granting Qwest's application is consistent with the public interest. As the Commission has recognized, granting a request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open and will remain so."⁷ As the Commission has likewise recognized, no such finding may be possible if the "BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations," because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations."⁸ Although the Commission "will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it has warned the BOCs that it will do so where "a pattern of discriminatory conduct" exists. At this time in history, when regulatory bodies are making every effort to hold corporations responsible for their malfeasance, it is especially important that the Commission cast a careful eye at pervasive patterns of noncompliance and anticompetitive conduct.

And Qwest has engaged in just such a pattern of discriminatory and anticompetitive conduct, despite Qwest's every effort to paint its transgressions as past misconduct that has been resolved going forward, contested complaints that were settled, or unadjudicated pending allegations that should not be considered here. The record illustrates that Qwest has engaged in just the kind of

⁷ See *SBC Texas 271 Order* ¶ 431; *New York 271 Order* ¶ 444.

⁸ *Michigan 271 Order* ¶ 397.

pervasive effort to forestall competition in its local exchange markets at the same time that it unlawfully provided service across LATA boundaries that demands Commission scrutiny in a Section 271 proceeding. In a variety of states and a variety of ways, Qwest has been *adjudicated* responsible for inhibiting local entry, among other things, having refused to permit UNE-P testing and to provide access to inside wiring in multiple dwelling units.

On at least three occasions, Qwest also has been *adjudicated* responsible for violating section 271, and yet Qwest continues to violate section 271, reflecting a studied hostility to its obligations under the Act and removing any possible basis for finding that Qwest can be trusted to comply in good faith with its obligations on a going forward basis. In particular, Qwest has undertaken a concerted campaign to reacquire its most valued divested interLATA customers and to provide them with prohibited in-region interLATA services through what it has brazenly asserted is the mere transfer of facilities. It is these very efforts that have resulted in the accounting problems that very recently thrust Qwest into the spotlight of public scrutiny.

As bad as they are, these violations are just the tip of the anticompetitive iceberg. As detailed below, Qwest also has demonstrated complete disregard for its section 251 and 252 obligations, by, among other things, refusing to file its secret interconnection deals with state commissions as required by section 252, “freezing” local service accounts to prevent customers from switching to competitive carriers, and refusing to allow CLECs even to test competitive offerings. In short, Qwest has exhibited just the kind of pattern of activity the Commission had recognized would support a finding that Qwest’s markets are not likely to remain open after a grant of Section 271 authority. Qwest’s own actions make it clear that there is no reason for the Commission to give Qwest the benefit of the doubt in its review of the unprecedented nine-state onslaught it has launched at the FCC.

In short, this clearly is the time and the case for the Commission to demonstrate the courage of the convictions that underlie the Act. This application, like the first, is deficient in virtually every relevant respect, and the Commission should deny it. Qwest must do much more to open its local

markets to competition – and to disclose and remedy its own ongoing misconduct – before it will qualify for section 271 authority.

I. QWEST’S PERVASIVE AND ONGOING SECRET DEALS DISCRIMINATION REQUIRES THAT THE COMMISSION REJECT THESE APPLICATIONS.

Non-discrimination is a bedrock principle of the Communications Act in general.⁹ In eight separate checklist items, Congress required that the BOC meet its substantive obligation in a nondiscriminatory manner.¹⁰ Indeed, Congress felt so strongly about this principle with regard to access to network elements that it *doubly* required “nondiscrimination” in Checklist Item 2.¹¹

Congress recognized that – absent broad nondiscrimination requirements – a BOC could effectively avoid its market opening obligations by discriminating in favor of a handful of carriers in return for section 271 support. Although those carriers might (temporarily) be better off, consumers and competition would certainly be worse off. That is because the BOC would predictably extend such favorable terms only to carriers that posed little threat to its core market dominance, and not those carriers that could truly threaten its local monopolies.

There is now overwhelming evidence that Qwest has attempted precisely this gambit. In an effort to create the false appearance that it has opened its local markets to competition, Qwest has promised favorable terms to selected carriers in return for those carriers’ promises not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest. These agreements, which blatantly favor some CLECs over others, are a patent violation of Qwest’s obligation to provide “access” to its network facilities on terms and

⁹ See *MCI Telecommunications Corp v. American Tel. & Tel. Co.*, 114 S. Ct. 2223 (1994), and section 271 in particular, *Michigan 271 Order* ¶ 334.

¹⁰ See 47 U.S.C. §§ 271(c)(2)(B)(i) (incorporating the non-discrimination obligations of sections 251(c)(2) and 252(d)(1)), 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii), (xiv) (incorporating the non-discrimination obligations of section 251(c)).

¹¹ See *id.* § 271(c)(2)(B)(ii) (requiring “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1),” which in turn require both “nondiscriminatory” access to UNEs and “nondiscriminatory” UNE rates).

conditions that are “nondiscriminatory.”¹² Indeed, it is hard to imagine conduct that goes more directly to the heart of the Act’s nondiscrimination requirement.

Moreover, Qwest’s secret agreements have a critically important impact on the remaining checklist requirements. Given Qwest’s complete failure to disclose to the Commission *any* of the discriminatory terms that appear in its many secret deals, there is no rational basis for the Commission to conclude that Qwest has satisfied the seven other checklist items that, like Checklist Item 2, prohibit discrimination. And because there is substantial evidence demonstrating that Qwest effectively bought the silence of CLECs, the Commission cannot rely on the *absence* of evidence of discrimination or other checklist violations to conclude that *any* of the checklist requirements are satisfied. Indeed, it is now clear that but for the existence of these secret deals, CLECs would have filed additional evidence in state section 271 proceedings demonstrating that Qwest was not satisfying its obligations under the Act. Nor can the Commission rely on the performance and other test data upon which Qwest relies because this data was skewed by the preferential treatment given to particular CLECs. In these circumstances, the only way that the Commission can be sure that Qwest has fully opened its markets to competition and has met its checklist burden is to allow state commissions to conduct comprehensive investigations regarding Qwest’s secret deals, to force Qwest to come clean about all of its secret deals and to reform its discriminatory practices, and then to restart the section 271 process.¹³

The Commission cannot ignore these fundamental violations of the Act’s core market opening provisions on the ground that Qwest has filed a petition seeking a Commission declaration that

¹² 47 U.S.C. § 271(c)(2)(B)(ii). The fact that Qwest provided certain carriers sweetheart deals is also highly probative of whether the rates, terms and conditions it has imposed on the disfavored carriers comply with the Act’s *substantive* standards of Checklist Item 2.

¹³ Qwest’s recent claim that it has “voluntarily committed to file with the states all future contracts, agreements, and letters of understanding negotiated with CLECs that create obligations in connection with Sections 251(b) or (c)” changes nothing. Qwest Reply Comments at 130, Docket No. 02-148 (filed July 29, 2002). This “commitment” is watered down by so many caveats as to make it meaningless. For example, it only applies to “future” agreements and specifically excludes agreements that “no longer are in effect” or that “involve payments to resolve past disputes.” *Id.* at 132. In any event, even if Qwest complies with its filing and “pick and choose” obligations on a going forward basis, this comes far too late to address the significant and irreparable harm caused to the section 271 review process.

Qwest's failure to file its secret interconnection agreements with state commissions did not violate section 252. Assuming Qwest had a colorable claim that section 252 could be read, as Qwest argues, to allow Qwest to file only selected passages of negotiated interconnection agreements – and the plain language of section 252 makes plain that this contention is frivolous – the declaratory order proceeding provides no lawful basis for ignoring the mounting secret deals evidence here. Even if the Act could be read as not requiring Qwest to *file* its secret, discriminatory agreements, that would not make Qwest's practice of favoring some CLECs with rate and non-rate terms that are not available to (or even known by) other CLECs any less discriminatory. The secret deals provide dispositive evidence that Qwest does not provide access to network elements (and other checklist items) on nondiscriminatory terms, and there is no possible basis for the Commission to ignore that evidence in this proceeding.

A. The Secret Deals Discrimination Is Undisputed.

It is now beyond dispute that Qwest has entered into blatantly discriminatory agreements with favored CLECs and has kept those agreements secret from state regulators and competitors by failing to file them with state commissions, as required by law. Further, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.

As a result of a six-month investigation into potential anticompetitive conduct, the State of Minnesota Department of Commerce filed a complaint against Qwest with the Minnesota Public Utilities Commission on February 14, 2002.¹⁴ That complaint alleges that Qwest entered into a series of secret, discriminatory agreements with various competitive LECs to provide preferential treatment for those competitive LECs with respect to access to rights of way, reciprocal compensation, and

¹⁴ See *Second Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission*, Docket No. P-421/C-02-197 (Attachment 2 hereto).

collocation.¹⁵ The Department of Commerce complaint included as exhibits 11 written agreements between Qwest and various CLECs that Qwest had never filed with the Minnesota Public Utilities Commission pursuant to section 252(a)(1). The Minnesota Department of Commerce is seeking civil penalties in excess of \$50 million against Qwest.¹⁶ The Minnesota PUC has already held one hearing before an ALJ and will conduct further proceedings, scheduled for August 6-8, on additional, newly discovered agreements between Qwest and McLeod before issuing a decision.

Significantly, the Minnesota Department of Commerce has uncovered evidence demonstrating that five of the agreements identified in its Complaint “were the direct result of efforts by Qwest to prevent Eschelon and McLeodUSA – two of Qwest’s largest wholesale customers – from participating in consideration of Qwest’s application to provide in-region, interLATA long-distance services by the state commissions and the FCC.”¹⁷ As a result of these secret agreements to silence Eschelon and McLeodUSA, the Minnesota Department of Commerce noted that “14 states, including Minnesota, have been reviewing Qwest’s section 271 application without the participation of two of Qwest’s largest wholesale customers in most of their workshops or adjudicative proceedings.”¹⁸ While “[t]he extent of the damage that these agreements have caused with respect to 271 proceedings across Qwest’s territory is still unknown,” the Minnesota Department of Commerce recently “uncovered information that Qwest has not provided accurate billing or access information

¹⁵ See Second Amended Verified Complaint ¶ 24 (“By entering into the Secret Agreements, Qwest is providing discriminatory treatment in favor of the CLECs that are party to these agreements and to the detriment of CLECs that are not”); *id.* at ¶ 26 (“[T]he ongoing and repeated behavior of Qwest in entering into these secret agreements was, and is, anticompetitive and in violation of federal and state law”).

¹⁶ See Second Amended Verified Complaint ¶¶ 275-77, 282.

¹⁷ See Comments Of The Minnesota Department of Commerce In Opposition To Qwest’s Petition For Declaratory Ruling, WC Docket No. 02-89, at p. 18 (filed May 29, 2002). See also *id.* (“Qwest granted Eschelon various preferences “in exchange for Eschelon agreeing not to participate in consideration of Qwest’s Section 271 application before any state commission or the FCC”); *id.* at 20 (“Qwest entered into a similar arrangement with McLeodUSA in exchange for an oral agreement to stay out of the Section 271 proceedings”; noting that McLeodUSA confirmed this in response to a discovery request).

¹⁸ *Id.* at 22.

for the UNE platform products ordered by Eschelon from Qwest at any time from 2000 through the present.”¹⁹ The Department’s investigation is continuing.²⁰

Several other state commissions in the Qwest region have commenced similar investigations. The New Mexico Public Regulatory Commission, for example, has issued over 80 subpoenas to competitive LECs operating in the state, requiring them to produce any and all agreements relating to interconnection that were not previously filed with that commission. Several additional secret agreements were recently produced in response to the subpoenas. The State of Washington has also begun an investigation.²¹

Two states have now issued decisions concluding that Qwest entered into interconnection agreements with individual CLECs that granted them preferential rates, terms and conditions (thereby discriminating against other CLECs) and also violated section 252(a)(1) and applicable state rules by failing to file these agreements with the state commissions. On May 29, 2002, the Iowa Utilities Board (the “IUB”) issued a decision concluding that Qwest violated section 252(a)(1) and section 38.7(4) of the Iowa Code by failing to file three agreements with the Board.²² The three agreements that the Board examined had been identified by the Minnesota Department of Commerce as involving CLEC operations in Iowa.²³ The Iowa Board concluded that the secret deals presented to it “include interconnection agreement provisions that should have been filed with the Board pursuant to § 252.”²⁴

¹⁹ *Id.* at 22-23.

²⁰ AT&T is aware, for example, that – prior to their defections from the workshops – Eschelon raised serious problems with Qwest’s UNE-P offering and McLeod raised issues with respect to access to poles/duct/conduits and rights of way.

²¹ *See, e.g.,* Deborah Solomon, *States Probe Qwest’s Secret Deals to Expand Long-Distance Service*, Wall Street Journal, Apr. 29, 2002, Section A:1 (col. 5) (2002 WL-WSJ 3393212) (noting investigations in Colorado, Arizona, Oregon, New Mexico, and Utah).

²² *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2 (May 29, 2002) (“Iowa Order”) (Attachment 3 hereto).

²³ Iowa Order at 2.

²⁴ *Id.* at 9. The Board made clear that this was not a close question with respect to any of the three agreements. *See id.* at 11 (“there can be no serious argument” that the terms of the first agreement “are not properly considered a part of an interconnection agreement”); *id.* at 12 (“there can be no real argument” that the terms of the second agreement are

The Board further concluded that each of the agreements was discriminatory because it granted preferential rates, terms or conditions to the CLEC. The first agreement was between Qwest and Covad and provided that U S West would commit to meeting several specific interconnection performance standards (including timing, service and quality standards for its firm order commitment (“FOC”) process, service intervals, new service failure rate, and facilities problems) not applicable to other carriers.²⁵ The Board found that “[e]ach of these service quality standards relates to interconnection, would have been of interest to other CLECs negotiating with U S WEST in the relevant time frame, and may still be of interest to other CLECs negotiating with Qwest today.”²⁶

The second agreement was between Qwest and McLeod and set going-forward rates that McLeod would pay for subscriber list information, amended the existing interconnection agreement to incorporate bill-and-keep in place of reciprocal compensation, and provided that certain interim rates would be treated as final.²⁷ The Board concluded that this nominal “settlement agreement” plainly “discriminated against other CLECs in favor of McLeod, at least in Minnesota.”²⁸ The Board explained:

Other CLECs that purchased services for resale apparently began paying higher rates on February 8, 2000, but McLeod was permitted to continue to purchase those same services at the lower interim rates for several more weeks. *It was a form of discrimination to extend this favored treatment to McLeod and not to other CLECs. This discrimination would not have been possible if the agreement had been filed with the various state commissions where it was intended to have effect (all 14 Qwest states).* Because the agreement was not filed in any state, Qwest was able to extend uniquely favorable treatment to McLeod, in return for which McLeod dropped its opposition to the Qwest-U S West merger. Thus, Qwest’s failure to file McLeod Agreement No. 1 violated both the letter and the purpose of the statute and the Board’s rule.

Id. at 13 (emphasis added).

“anything other than an interconnection agreement”); *id.* at 15 (“Qwest’s own arguments establish” that the third agreement “is an interconnection agreement that must be filed with the Board”).

²⁵ *Id.* at 9-10. For example, “U S West (and, as a result of the subsequent merger, Qwest) agree[d] to provide 90 percent of Covad’s FOC dates within 48 hours of receipt of a service request for regular unbundled loop services and within 72 hours of a service request for DSL-capable, ISDN-capable, and DS-1-capable unbundled loop services.” *Id.* at 10.

²⁶ *Id.* at 10.

²⁷ *Id.* at 11-12.

²⁸ *Id.* at 13.

The third agreement – also between Qwest and McLeod – established escalation procedures to facilitate dispute resolution and quarterly executive meetings to resolve issues relating to implementation of the interconnection agreements.²⁹ The Board concluded that these provisions “are logical and necessary parts of a comprehensive interconnection agreement” and that exempting these “important” provisions from the filing requirement “would undermine the pick-and-choose and nondiscrimination features of the Act.”³⁰

The Iowa Board further recognized that the three unfiled agreements it examined may be just the tip of the iceberg. It therefore ordered Qwest to “file any other non-filed interconnection agreements with the Board” within 60 days.³¹ Qwest declined to request a hearing with respect to the Iowa Board’s conclusions, and the tentative decision is now final.

The staff of the Arizona Corporation Commission (“ACC”) recently confirmed the obviousness and seriousness of Qwest’s unlawful and anticompetitive conduct, concluding that Qwest violated its filing obligations under section 252 by failing to file at least 25 agreements with the ACC.³² The ACC staff made specific findings that the unfiled agreements are discriminatory:

It is clear, for instance, through Qwest’s own description of what it includes within the terms and conditions of business-to-business arrangements, *i.e.*, dispute resolution, escalation procedures, account team support, and the mechanics of provisioning and billing for ordered interconnection services, that giving favored treatment to one carrier while denying it to another, is the very type of discrimination that the Act attempts to prevent. Without the level of transparency achieved through public filing of these agreements, it would be impossible to ensure that the provisions of the Act were being carried out in a nondiscriminatory manner, an important prerequisite to the development of competition in Arizona . . . The Commission cannot determine the nature of, and CLECs cannot pick and choose terms, that are kept secret . . . Staff believes that this is exactly the type of discrimination that the Act seeks to prevent.³³

²⁹ *Id.* at 14-15.

³⁰ *Id.* at 15.

³¹ *Id.* at 21.

³² See *Staff Report And Recommendation In The Matter Of Qwest Corporation’s Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002) (“Arizona Report”) (Attachment 4 hereto).

³³ *Id.* at 15-16.

The Arizona Staff particularly noted the “egregious nature of [Qwest’s] infraction” with respect to seven agreements which had provisions “in which CLECs agreed that they would not participate in regulatory proceedings before the FCC,” including section 271 proceedings.³⁴ The Staff recognized that these agreements “which attempt to suppress participation by all parties for full development of the record in regulatory proceedings before the Commission are not in the public interest.”³⁵ Arizona “Commission Chairman William Mundell said he was ‘shocked and disgusted’ when he read the clauses in question. ‘It’s very troubling that Qwest would have competitors sign interconnection agreements to not participate in the 271 process,’ he said. ‘Whether it’s one (competitor) or 50, the fact that a competitor has to sign an agreement not to participate goes to the heart of the process,’ Mundell said.”³⁶

ACC Staff also recognized that it may not have identified all of Qwest’s secret agreements.³⁷ An ALJ recently heard arguments on whether the ACC should proceed to a full hearing on this matter. And two of the three Arizona commissioners have now properly recognized that the only possible course in light of Qwest’s secret deals misconduct is to suspend further consideration of Qwest’s section 271 proceeding, pending further investigation: “It is clear to me that continuing with our Section 271 review must be suspended until the Commission can determine to what extent the agreements in question may have compromised the entire Section 271 review.”³⁸ In this regard, Arizona Commission Staff recently issued data requests to the consultants who conducted performance tests.

³⁴ *Id.* at 1-2, 19.

³⁵ *Id.* at 1; *see also id.* at 16 (“[P]rovisions in agreements which gave favored treatment in exchange for a party’s agreement not to participate in proceedings before this Commission . . . are of extreme concern to the Commission and detrimental to the public interest”).

³⁶ Oscar Abeyta, *Probe Will Slow Qwest’s Arizona Call Application*, Tucson Citizen, June 20, 2002, at 1B.

³⁷ *See id.* at 20 n.4 (“These recommendations should also apply to agreements subsequently submitted by CLECs (in response to Staff data requests) which Qwest may not have filed and which Staff determines should have been filed by Qwest under Section 252(e).”)

³⁸ *See* Letter of Commissioner Jim Irvin to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) (Attachment 1 hereto); *see also* Letter of Commissioner Marc Spitzer to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 26, 2002) (“[T]he question I posed in my initial letter must first be answered before the

In a blatant effort to preempt these ongoing state investigations, and to dodge the section 271 implications of its pervasive discrimination, Qwest filed a request for a declaratory ruling with the Commission with respect to the scope of its filing obligations under section 252(a)(1).³⁹ Specifically, Qwest requested “guidance” as to “which types of negotiated contractual arrangements between ILECs and CLECs are subject to the mandatory filing and 90-day state commission pre-approval requirements of Section 252(a)(1) – and which are not.” *Id.* at 3. This petition is a frivolous attempt by Qwest to seek cover for its unlawful failure to file secret, discriminatory agreements and to avoid the fatal section 271 consequences of that misconduct. All commenters uniformly opposed Qwest’s Petition, and AT&T and other commenters demonstrated that Qwest’s proposed narrow construction of section 252(a)(1) flies in the face of the statute’s plain language.⁴⁰ In addition, several commenters provided additional evidence of Qwest’s discriminatory and anticompetitive practices.⁴¹

Regardless of the Commission’s ruling on the section 252 filing requirement issues raised in the declaratory ruling proceeding, Qwest has engaged in blatant discrimination against CLECs, in direct violation of its nondiscrimination obligations under the Act. The Commission cannot lawfully disregard that discrimination in this proceeding.⁴²

Commission moves forward on the remaining issues regarding Qwest’s entry into the long distance market.”) (Attachment 5 hereto).

³⁹ See *Petition For Declaratory Ruling Of Qwest Communications International, Inc.*, WC Docket No. 02-89 (filed Apr. 23, 2002).

⁴⁰ See *Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc.*, WC Docket No. 02-89, at 6-10 (filed May 29, 2002).

⁴¹ See Comments of Touch America, Inc. at 2 n.2, 4-6 & n.4, 9; Comments of PageData.

⁴² DOJ took the position in its evaluation of Qwest’s first section 271 joint application that Qwest’s secret deals discrimination should not be addressed in the section 271 proceedings and, instead, should be addressed “through dockets in which such matters are directly under investigation.” DOJ Eval. at 3, Docket No. 02-148 (July 23, 2002) (“DOJ Eval”). This position flies in the face of section 271. The fundamental purpose of the section 271 approval process is for the Commission to consider precisely these issues. Section 271 expressly provides that “[t]he Commission *shall not approve* the authorization requested . . . unless it finds that” the applicant has “fully implemented” the requirements of the competitive checklist. 47 U.S.C. § 271(d)(3) (emphasis added). By requiring that all checklist requirements are satisfied *before* the BOC enters the long-distance market, section 271 ensures that BOCs do not enter the long-distance market at a time when they are able to leverage their local monopoly power into the long-distance market. Accordingly, DOJ’s suggestion that the Commission should address Qwest’s discrimination in other proceedings and, if it later finds a violation, levy sanctions including “suspension or revocation of any Section 271 authority that the Commission may have granted in the interim,” plainly has the cart before the horse. DOJ Eval. at 3. The Commission has a statutory obligation

B. The Secret Deals Foreclose Any Finding That Qwest Has Met Its Checklist Or Public Interest Burdens.

The mounting evidence of Qwest's secret, discriminatory agreements with selected CLECs precludes any finding that Qwest has satisfied its obligation to provide nondiscriminatory access to UNEs as required by Checklist Item 2. Indeed, it is hard to imagine a more blatant example of providing discriminatory access to UNEs. Qwest has given a few CLECs preferential UNE rates and superior access to UNEs to the competitive detriment of all others. Qwest further engaged in a deliberate campaign to keep these deals secret from regulators by requiring the favored CLECs to promise not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest.

This discrimination impedes competitive entry by the disfavored CLECs. Not only do they face an entrenched monopolist that is unwilling to provide them with commercially reasonable access to its bottleneck facilities, but the favored secret deal competitors do not face these overwhelming disadvantages. Whereas the favored CLECs have a Qwest representative to assist them in navigating Qwest's inadequate OSS, other competitive carriers do not. Even where the disfavored competitive carriers can succeed in placing orders, they must pay excessive rates for UNEs and interconnection. This not only puts them at an enormous competitive disadvantage against Qwest, but also against other CLECs that are able to purchase access to Qwest's network at lower rates. And when the inevitable problems arise in dealing with a supplier that has no interest in the emergence of local competition, most CLECs must resort to costly and time consuming litigation to vindicate their rights under the Act. Those CLECs that are parties to the secret deals, in contrast, are entitled to expedited dispute resolution with Qwest.⁴³

The magnitude of this discrimination precludes any finding that Qwest's applications satisfy the public interest. By favoring selected CLECs at the expense of others, Qwest has assured that it

to address the allegations in *this* proceeding, and cannot grant the joint application with respect to *any* state unless it concludes that Qwest currently is satisfying all checklist obligations.

⁴³ See *Iowa Order* at 14-15.

will not face ubiquitous, effective competition in any of the applicant states. Granting the applications under these conditions would, by definition, eliminate Qwest's incentives fully to open its local markets.

Even without the direct evidence of Qwest's discriminatory conduct uncovered so far, the Commission could not make a reasoned determination that Qwest has satisfied its nondiscrimination obligations, for two independent reasons. First, the state investigations are ongoing and the full scope and extent of Qwest's discriminatory conduct are not yet known. State commissions are still trying to identify and obtain copies of interconnection agreements that Qwest improperly failed to file (and has not been forthcoming in producing voluntarily, necessitating the use of subpoenas and data requests). Without the benefit of complete investigative findings from the state commissions, and without any independent analysis of the unfiled agreements (which Qwest has not submitted for Commission review), there can be no finding that Qwest has met any of the eight checklist items that expressly forbid discrimination.

Second, wholly apart from the issue of the scope and extent of Qwest's discriminatory conduct, Qwest's secret agreements taint its ability to demonstrate compliance with the other checklist requirements. This is because the evidence demonstrates that Qwest bought the silence of CLECs that have additional information bearing on Qwest's checklist compliance and because, even apart from the issue of CLEC participation in section 271 proceedings, the performance and other test data upon which Qwest relies were skewed by its preferential treatment of particular CLECs. Indeed, Eschelon has now confirmed that it was prevented by its secret agreement with Qwest from providing critical evidence regarding Qwest's failure to comply with the Act in state section 271 proceedings.⁴⁴ As a consequence, the Commission cannot rely on the *absence* of evidence of discrimination or other checklist violations in the state proceedings to conclude that the checklist requirements are satisfied. Nor, because of Qwest's anticompetitive actions, can the Commission rely on the *absence* of

⁴⁴ Letter from J. Jeffrey Oxley, Eschelon, to Bruce Smith, Colorado PUC, Docket No. 02M-260T (filed May 16, 2002) (Attachment 6 hereto).

evidence of discrimination or other checklist violations in *this* proceeding. Accordingly, unless the Commission conducts an independent investigation of Qwest's compliance with all checklist items, the Commission cannot make a reasoned determination that Qwest has satisfied its nondiscrimination and other checklist obligations.⁴⁵ Absent such an independent investigation, any finding by the Commission that Qwest has satisfied the competitive checklist would be reversible error.⁴⁶

Nor can there be any suggestion that the burden is upon commenters to prove the scope of the discrimination and harm to the record caused by Qwest's secret deals misconduct. It is *Qwest's* burden here to prove checklist compliance and, therefore, Qwest's burden to prove that its pervasive discrimination had no material impact on the evidence (including performance data and state commission findings) upon which it attempts to rely. Any attempt to shift this burden of proof to commenters would be patently unlawful. And Qwest has, of course, made it impossible for commenters to meet any such burden by refusing to disclose the full nature of its discrimination and by insisting that this proceeding go forward before KPMG and state commissions could conduct the full investigations that would be required to eradicate the secret deals distortion. In sum, the burden is on Qwest and Qwest has not even attempted to meet it.

The terms of the secret deals uncovered to date also provide conclusive evidence that Qwest has not provided just, reasonable and cost-based UNEs and interconnection to CLECs. In each of the applicant states, Qwest has offered under the table UNE rates well below the rates it relies upon to support its applications. For example, in a secret agreement with Eschelon, Qwest provided a flat 10

⁴⁵ Significantly, in its evaluation of Qwest's first section 271 joint application, DOJ acknowledges the "questions as to the quality of the record," noting that "[p]erformance data relating to the CLECs that are alleged to have received preferential treatment are included in the aggregate data included in Qwest's filing and were relied upon by KPMG" during portions of the OSS test. DOJ Eval. at 4. DOJ further acknowledges that "[t]he three-year process [of gathering performance data] might well have been more efficient and comprehensive with the full and open participation of all interested CLECs." *Id.* at 5. Despite these acknowledgements, however, DOJ concludes that "the fact that certain CLECs did not participate does not appear to have had a significant impact on the result." *Id.* This conclusion is wholly unsubstantiated. Indeed, it could not be substantiated because DOJ cannot know what the CLECs who were bought off *would have contributed to the record* if they had not been silenced or how much Qwest's special treatment of its secret deals partners skewed the performance and other data.

⁴⁶ See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decision is arbitrary and capricious if agency "entirely failed to consider an important aspect of the problem"); *Sprint Communications Co. v.*

percent discount on all purchases made by Eschelon from Qwest.⁴⁷ Eschelon also received a significant per line per month rebate based on Qwest's inability to provide accurate daily usage information.⁴⁸ It, of course, would defy common sense to believe that Qwest has voluntarily agreed to UNE rates that are below Qwest's own forward-looking, economic costs of providing the UNEs. Thus, by charging favored CLECs much less for UNEs and interconnection than the rates set by the state regulatory commissions, Qwest has through its own actions demonstrated that those rates are well in excess of TELRIC.

Qwest's failure to fully disclose the nature of its secret deals has a second and independent consequence: it violates Commission Rule 1.17. Rule 1.17 states that "[n]o applicant . . . shall . . . *in any application*, pleading, report or in any other written statement submitted to the Commission, make any misrepresentation or willful material *omission* bearing on any matter within the jurisdiction of the Commission."⁴⁹ Moreover, both the D.C. Circuit and the Commission have emphasized that the duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications.⁵⁰ As explained above, there is no question that any documents or other written evidence relating to Qwest's secret deals with CLECs are material to this proceeding. Indeed, that material is necessary to fully assess the scope and extent of the discrimination caused by those secret deals. And those documents must be made available to, and reviewed by this Commission or the state commissions before any reasoned finding can be made that Qwest has complied with the competitive checklist, or that a grant of Qwest's application is in the public interest. Qwest's failure to include with its application the content of the secret deals it has

FCC, 274 F.3d 549, 553-56 (D.C. Cir. 2001) (remanding 271 order to Commission for failure to consider clearly relevant factor in granting application).

⁴⁷ See Second Amended Verified Complaint ¶ 99 (quoting paragraph 3 of *Confidential Amendment to Confidential/Trade Secret Stipulation*, Nov. 15, 2000).

⁴⁸ *Id.* at ¶ 110.

⁴⁹ 47 C.F.R. 1.17.

⁵⁰ See *Rainbow Broadcasting Co.*, 13 FCC Rcd. 21000, ¶ 25 (1998); *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994).

entered into with selected CLECs leaves the Commission uninformed of information that is material to Qwest's Application.⁵¹ Qwest's application is therefore deficient and must be denied.

II. QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

Because "access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements (UNEs) under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable," a BOC seeking Section 271 authority must demonstrate that it provides nondiscriminatory access to its OSS.⁵² The Commission has repeatedly found that "nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition," and that absent such access, CLECs "will be severely disadvantaged, if not precluded altogether, from fairly competing" in the local exchange market.⁵³

Qwest falls well short of meeting its obligation to provide nondiscriminatory access. For example, Qwest's current change management process – which has been "redesigned" in recognition of the patent inadequacies of its predecessor – is so recent in nature that Qwest cannot establish the "pattern of compliance" with the CMP that the Commission requires of every Section 271 applicant. Moreover, Qwest fails to provide CLECs with a suitable test environment that gives them a meaningful opportunity to compete.

Nor does Qwest provide CLECs with nondiscriminatory access to OSS functions. Qwest's OSS, for example, are plagued by high rates of order rejections and excessive reliance on manual

⁵¹ Moreover, the law ordinarily teaches that "the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." WIGMORE ON EVIDENCE § 285 (1940); *see also* McCORMICK ON EVIDENCE § 272 (1984) (espousing the "classic" statement of the law to be that "if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (footnote omitted)).

⁵² *New Jersey 271 Order*, App.C ¶ 26.

⁵³ *See, e.g., New Jersey 271 Order*, App. C ¶ 25; *Georgia/Louisiana 271 Order*, App. D ¶ 25; *New York 271 Order* ¶ 83.

processing of electronically submitted orders. These problems are exacerbated by the manual errors made by Qwest personnel on CLEC orders, which increase the likelihood of errors and delays in provisioning. CLECs cannot even verify whether they are being charged accurately for the (inferior) service that they are receiving from Qwest, since Qwest has not provided them with wholesale bills that can be readily audited and verified.

As described below, Qwest's own performance data – which is the most probative evidence of whether Qwest is meeting its OSS obligations – show that Qwest is not providing parity of OSS to its OSS.⁵⁴ Even if such data were unavailable, however, the third-party testing of Qwest's OSS by KPMG Consulting ("KPMG") does not support Qwest's claim that it is providing nondiscriminatory access.

The KPMG test is of no real-world value because the results were based on input from CLECs that received preferential secret deals treatment from Qwest that is not available to other carriers.⁵⁵ KPMG has recognized that reliance on information and representations from "secret deal" CLECs may have skewed its results, but has flatly refused to analyze the impact of these agreements on the test results. In these circumstances, the Commission can give no weight to KPMG's finding that Qwest "satisfied" certain evaluation criteria that KPMG used in the test.⁵⁶

Even leaving aside the fact that the results of the KPMG test overstate Qwest's actual performance, those results, in fact, undermine Qwest's claims of compliance with its OSS obligations. KPMG's conclusions make clear that Qwest cannot show that it has adhered to its change management process over time, and or that it has established a suitable test environment. The KPMG report also reveals a number of flaws in Qwest's performance – including errors in manual processing, inadequate provision of status notices, and untimely installations – that deny parity of

⁵⁴ The Commission has consistently held that the most probative evidence that a BOC is providing nondiscriminatory access to its OSS is "actual commercial usage." *New Jersey 271 Order*, App. C ¶ 31; *Georgia/Louisiana 271 Order*, App. D ¶ 31; *Texas 271 Order* ¶ 98; *New York 271 Order* ¶ 89; *Michigan 271 Order* ¶ 138.

⁵⁵ Finnegan/Connolly/Menezes Decl. ¶¶ 16-18.

⁵⁶ *Id.*

access to CLECs. Thus, if (as Qwest asserts) the Commission should accord “substantial deference” to KPMG’s conclusions (Application at 118), Qwest cannot reasonably be found to be providing nondiscriminatory access.

A. Qwest Has Neither Established, Nor Adhered To, an Adequate Change Management Process.

Adequate change management processes are essential to viable local competition. “Without a change management process in place, a BOC can impose substantial costs on competing carriers simply by making changes to its systems and interfaces without providing adequate testing opportunities and accurate and timely notice and documentation of the changes.”⁵⁷ Thus, in determining whether a BOC has given CLECs a meaningful opportunity to compete, the Commission “will give substantial consideration to the existence of an adequate change management process and evidence *that the BOC has adhered to this process over time.*”⁵⁸

Qwest has neither established, nor complied with, an effective change management process. Because its “redesigned” CMP is in its infancy, Qwest cannot establish that it has “adhered to this process over time.” Moreover, as KPMG found in its testing, Qwest has not provided CLECs with a stable testing environment that mirrors, but is separate from, the production environment.

1. Qwest Has Not Shown That It Has Adhered To an Adequate Change Management Process Over Time.

In determining whether a change management plan offers a meaningful opportunity to compete, the Commission evaluates, *inter alia*, “whether the BOC has demonstrated a pattern of compliance with the plan.”⁵⁹ As the Staff of the Arizona Corporation Commission recently stated, the compliance issue “is critical because it is one thing to have a process that looks good on paper versus a process that works in practice.”⁶⁰

⁵⁷ *Georgia/Louisiana 271 Order*, App. D ¶ 41.

⁵⁸ *Id.*, App. D ¶ 40; *Texas 271 Order* ¶ 106; *New York 271 Order* ¶ 102 (emphasis added).

⁵⁹ *Georgia/Louisiana 271 Order*, App. D ¶ 42.

⁶⁰ Filip Decl., Exh. DFL-CMP 10, at 28 (¶ 86) (ACC Staff supplemental report dated May 7, 2002).

Qwest cannot show that it has adhered to its current CMP “over time,” or otherwise establish a “pattern of compliance” with that process, because the process is too recent – and only in the final stages of completion. The current CMP is the result of a “redesign” process that began in July 2001, and continues today.⁶¹ Some of the major provisions were agreed to only recently, and some of them have not yet been implemented.⁶² The provisions governing the advance notice required for releases, and other critical provisions of the “redesigned” CMP, were implemented only on or after April 1, 2002.⁶³

Because the “redesigned” CMP is still in its infancy, Qwest cannot establish that it has adhered to that process “over time.” None of Qwest’s major releases has been fully implemented under the current provisions of the “redesigned” CMP on an end-to-end basis. Qwest precluded KPMG from conducting such end-to-end testing even on the CMP’s newly implemented prioritization and “packaging” processes, by requesting that KPMG conduct no further testing.⁶⁴

Qwest boasts that it “has promptly implemented every aspect of the redesigned [CMP] as soon as it has been agreed upon” in the “redesign” process.⁶⁵ Merely implementing a provision of the CMP, however, does not establish compliance with that provision “over time.” Moreover, Qwest’s description of the percentage of “milestones” that it allegedly has met provides no indication of its compliance with the CMP. In the first place, Qwest has not even fully described the “milestones”

⁶¹ In June 2001, Qwest requested that CLECs participate in a process for “redesigning” its change management process (then known as the Co-Provider Industry Change Management Process, or “CICMP”) after two separate third-party testers found, and the CLECs demonstrated in Section 271 proceedings, that the CICMP was seriously defective. Finnegan/Connolly/Menezes Decl. ¶¶ 33-34. Obviously recognizing the flawed nature of the CICMP, Qwest disavows any reliance on the CICMP for any purpose in this proceeding, including the issue of whether it has established a “pattern of compliance.” Application at 143 n.61, 153 n.66.

⁶² Finnegan/Connolly/Menezes Decl. ¶¶ 36, 39. For example, the parties agreed to a manual workaround procedure for the redesigned CMP only on June 17-18, 2002, and voting procedures on July 10, 2002. Neither of those procedures had been fully implemented at the time Qwest filed its Application. *Id.*

⁶³ *Id.* ¶ 39.

⁶⁴ See Finnegan/Connolly/Menezes Decl. ¶ 61-64. In denying KPMG an opportunity to conduct further testing on an end-to-end basis, Qwest ignored the admonition of the Common Carrier Bureau to Qwest’s predecessor, US WEST, that prior to filing a Section 271 application it should allow an independent evaluator to conduct “a review of the BOC’s ability to implement at least one significant software release.” Letter from Lawrence E. Strickling (Chief, Common Carrier Bureau) to Nancy E. Lubamersky (US WEST) dated September 27, 1999, at 2.

⁶⁵ See Application at 153.

that it cites, or provided the basis for its percentages of “milestones” met. And Qwest has refused to provide back-up data for its “milestones,” notwithstanding AT&T’s request that it do so.⁶⁶

Furthermore, even based on its limited description, Qwest’s “milestones” are plainly an artificial, manipulative attempt by Qwest to establish a pattern of compliance. The “milestones” appear to represent every step that Qwest takes (or is required to take) under the “redesigned” CMP, including tasks that are purely administrative or ministerial in nature.⁶⁷ Most of them reveal little, if anything, about the extent of Qwest’s compliance with the CMP. For example, one of Qwest’s “milestones” – whether Qwest has held regular meetings under the CMP – provides no indication of the actual effectiveness of the meeting itself, or of Qwest’s actual conduct at the meetings (including its failure to produce subject matter experts at the meeting who are sufficiently knowledgeable to address particular change requests).⁶⁸

The inability of Qwest to establish compliance with the “redesigned” CMP is confirmed by KPMG’s testing. In its Final Report, KPMG concluded that it was not able to verify whether Qwest adhered to the redesigned CMP, because many of whose provisions were “either too new, or not yet mature enough to evaluate.”⁶⁹ KPMG based its conclusion on three exceptions that it opened during its test, which found that Qwest was *not* adhering to the provisions of the CMP. KPMG closed each of these exceptions as “unresolved” or “inconclusive” because, as indicated in its report, the various provisions of the CMP that it would have been required to observe for compliance had not yet been adopted, or had been adopted only recently – thereby precluding KPMG from making any

⁶⁶ Finnegan/Connolly/Menezes Decl. ¶¶ 42-48.

⁶⁷ The “milestones,” for example, include whether Qwest holds regular CMP meetings, sends an acknowledgment to an originator of a change request, and posts a change request to its web site. Finnegan/Connolly/Menezes Decl. ¶ 44. Since it appears that Qwest has included every step or action that it takes (or is required to take) under the “redesigned” CMP as a “milestone,” it is hardly surprising that Qwest describes “a possible 939 milestones” alone for 159 OSS interface change requests, and “a possible 328 milestones” for 45 product/process change requests. *Id.* ¶ 45.

⁶⁸ *Id.* ¶ 46.

⁶⁹ *Id.* ¶ 49 (quoting KPMG Final Report).

assessment.⁷⁰ In the case of one exception, which involved the newly adopted prioritization and packaging processes of the CMP, Qwest expressly requested that KPMG conduct no further testing.⁷¹

Because KPMG issued its report – including its conclusion that it was unable to evaluate Qwest’s compliance with the CMP because of its recent nature – only six weeks before Qwest filed its Application, that conclusion should be dispositive here. Apparently recognizing this fact, Qwest argues that the various components of the “redesigned” CMP that KPMG was unable to evaluate “are outside what the [Commission] has required for Section 271 purposes” and “do not have implications for section 271 approval.” Application at 156-157. Qwest’s argument, however, is flatly contrary to the Commission’s precedents.⁷²

Like KPMG, Cap Gemini Ernst & Young – which conducted third-party testing of Qwest’s OSS in Arizona – concluded in May that “insufficient time has passed since the inauguration of the redesign process to determine whether Qwest has established a pattern of compliance with its redesigned CMP over time.”⁷³ The inability to evaluate Qwest’s compliance was cited by the Staff of the Arizona Corporation Commission as a “critical” and “important” exception to its finding that the CMP otherwise met the requirements of Section 271.⁷⁴

⁷⁰ *Id.* ¶¶ 51-53, 58-63.

⁷¹ *Id.* ¶¶ 61-64. Qwest’s claim that it “complied with the CMP prioritization procedures” for the IMA 10.0 and 11.0 releases is incorrect. Application at 156. As KPMG found, Qwest improperly bypassed those procedures for both releases by misclassifying certain of its own change requests as regulatory change requests (which resulted in preferential treatment of the requests), over the objections of the CLECs.

⁷² For example, although Qwest asserts that the Commission has never required an RBOC to have a change management process for product/process changes, it admits that the “product/process CMP” includes manual processes – which the Commission has included within its definition of “OSS systems” subject to the change management process. *Georgia/Louisiana 271 Order*, App. D ¶ 41; *Ameritech Michigan Order* ¶ 134 (including, within definition of OSS, all “manual functions a BOC has undertaken to provide access to OSS”). Similarly, despite Qwest’s assertion that prioritization of regulatory changes is not within the scope of the Commission’s review of a CMP, the Commission has not only included changes mandated by regulators within its concept of change management, but has also reviewed prioritization processes as part of its analysis of the adequacy of a change management plan. *See, e.g., Georgia/Louisiana 271 Order*, App. D ¶ 41 (stating that changes subject to change management process include “changes that may be mandated by regulatory authorities”); *id.*, ¶¶ 183-184, 193 and *New York Order* ¶¶ 106, 115, 124-125 (evaluating prioritization process of CMP of Section 271 applicant).

⁷³ Finnegan/Connolly/Menezes Decl. ¶ 65; Filip Decl., Exh. DLF-CMP- 9 at 31.

⁷⁴ Finnegan/Connolly/Menezes Decl. ¶ 65; Filip Decl., Exh. DLF-CMP-10 at 28 (¶ 86).

2. Qwest Has Not Provided an Adequate Test Environment To CLECs

An important factor in the Commission's analysis of the adequacy of a BOC's change management process is whether the BOC has provided a "stable testing environment that mirrors the production environment and is physically separate from it."⁷⁵ Neither of the testing environments offered by Qwest meets this requirement.

Qwest's "Interoperability Environment" is inadequate because, as Qwest admits and as KPMG found, it is not separate from the production environment.⁷⁶ Furthermore, as Qwest acknowledged last year in its "White Paper" on its Stand-Alone Test Environment ("SATE"), the Interoperability Environment does not mirror the production environment, because responses to CLEC transactions are returned manually even if they would be returned in automated form in the production environment.⁷⁷ It was precisely because of these and other deficiencies in the Interoperability Environment that Qwest agreed to develop SATE as an alternative test environment.⁷⁸

SATE, Qwest's alternative test environment, is equally inadequate. First, SATE is not a stable testing environment – which the Commission has defined as an environment where "no changes by the BOC are permitted after the testing period commences."⁷⁹ Qwest does not "freeze" both the version of a release in SATE and the implemented version of the release so that changes cannot be made to one without making the same changes to the other. Thus, the test release may differ from the release that is actually implemented.⁸⁰

Second, as KPMG found, SATE fails to mirror the production environment. SATE does not support many of the products and transactions that are available in the production environment. As a

⁷⁵ *Georgia/Louisiana 271 Order* ¶ 187 (quoting *Texas 271 Order* ¶ 132); see also *Georgia/Louisiana 271 Order* ¶ 179.

⁷⁶ See Application at 145 (Interoperability Environment "us[es] real production legacy systems").

⁷⁷ Finnegan/Connolly/Menezes Decl. ¶ 82.

⁷⁸ When KPMG issued an exception noting these deficiencies in the Interoperability Environment, Qwest responded that it had "no plans to enhance the Interop[erability] environment," but instead would "continue to enhance SATE." Finnegan/Connolly/Menezes Decl. ¶¶ 83-84.

⁷⁹ *Texas 271 Order* ¶ 132 n.350; *New York 271 Order* ¶ 109 n.301.

⁸⁰ Finnegan/Connolly/Menezes Decl. ¶ 89.

result, CLECs cannot test every product that they desire to offer before offering the products in actual commercial production.⁸¹ SATE also fails to mirror the production environment because the responses that it returns to CLECs may be different from those that would be returned in actual production.⁸² Finally, SATE does not support “real world scenario testing” because – unlike the production environment – CLECs using SATE are required to choose a “path” for the response that will determine the time within which it is returned.⁸³

Because of these deficiencies, KPMG issued two exceptions, both of which it closed as “unresolved” after Qwest requested that no further testing be conducted. As a result, KPMG found that Qwest did *not* satisfy its evaluation criterion of whether “[a] functional test environment is made available to customers for all supported interfaces.”⁸⁴

Qwest does not dispute that SATE contains these deficiencies, but argues that they are not “significant under Section 271.”⁸⁵ The Commission’s precedents, however, do not support Qwest’s position. For example, although the Commission held in the *Texas 271 Order* that the lack of flow-through capability in SWBT’s test environment did not preclude a finding that the test environment satisfied the requirements of section 271, the Commission based its decision on the “totality of the circumstances.” Thus, contrary to Qwest’s assertions, the Commission did not unequivocally hold

⁸¹ *Id.* ¶¶ 90-93. SATE has also previously lacked flow-through capability, thus precluding CLECs from determining whether their test orders would flow through in actual production. Although Qwest asserts in its Application that it has now implemented flow-through capability in SATE in all three of its regions, that implementation was completed only on May 20, 2002, and was not tested by KPMG, due to the implementation schedule and Qwest’s request that no further testing be conducted. *Id.* ¶¶ 99, 105.

⁸² *Id.* ¶¶ 96-98, 100, 108-114.

⁸³ *Id.* ¶ 104.

⁸⁴ *Id.* ¶ 101.

⁸⁵ See Application at 148-150. Qwest attempts to rely on the data that it has reported under PID PO-19 as evidence that SATE reflects the production environment. Application at 147. However, the data reported by Qwest under this PID provides no basis for Qwest’s position, because Qwest has improperly calculated the data by comparing the responses received in SATE with the responses that a CLEC *should* receive in the production environment – not with the responses that a CLEC *did* receive. Finnegan/Connolly/Menezes Decl. ¶ 115 n.78. See also Application at 147 (acknowledging that Qwest has agreed to modify PO-19 to create “a submeasure that would compare the execution of the same transactions in production and in SATE, in order to further measure the extent to which SATE mirrors production”).

that BOCs are not required to implement flow-through capability in their test environments.⁸⁶ Moreover, SWBT's test environment did not suffer from the deficiencies (aside from lack of flow-through capability) in SATE.⁸⁷

Qwest's other attempts to defend the deficiencies in SATE are equally baseless. Contrary to Qwest's assertions, its recent implementation of flow-through capability in SATE will not cure the failure of SATE's responses to mirror responses in the production environment, since the two are entirely different problems. Nor will the implementation of flow-through capability affect the requirement that CLECs choose "paths" for their responses.⁸⁸ Finally, Qwest's assertion that any differences in responses between SATE and the commercial environment are "intended," but do not "affect a CLEC's ability to test its code" (Application at 149) simply misses the point. Because of the differences in responses as between SATE and the production environment, SATE provides no assurance that the same results will be achieved in the production environment.

Qwest further suggests (Application at 149-150) that the failure of SATE to reflect the production environment does not adversely affect CLECs, because Qwest's documentation describes any differences between SATE and production, and CLECs may seek elimination of those differences through such procedures as the submission of a change request. Qwest is incorrect. As KPMG has stated, documentation of differences between SATE and actual production "does not substitute for a test environment that mirrors the transactional behavior of the production

⁸⁶ See *Texas 271 Order* ¶ 138.

⁸⁷ Finnegan/Connolly/Menezes Decl. ¶¶106-107.

⁸⁸ *Id.* ¶¶ 104-105. In addition to failing to offer an adequate test environment for pre-ordering, ordering, and provisioning functions (for which the Interoperability Environment and SATE are used), Qwest fails to offer a suitable test environment for maintenance and repair functions. As KPMG found, the testing environment that Qwest offers for its "EB-TA" maintenance and repair interface is deficient because it is not separate from the actual production environment. As a result of this lack of separation, test transactions could invade the production processes and result in erroneous dispatches of technicians. Finnegan/Connolly/Menezes Decl. ¶¶ 122-125. Qwest's rationalization that it is not required to meet the Commission's criteria for a suitable test environment in the context of maintenance and repair functions is unsupported by Commission precedent. See Application at 148 n.63. CLECs need a stable test environment that mirrors, but is separate from, production in the context of maintenance and repair interfaces for the same reason that such an environment is needed in the context of pre-ordering and ordering: to ensure that they "are capable of interacting smoothly and effectively with a BOC's OSS," and that their transactions will not "succeed[] in the testing environment but fail[] in production." See *Georgia/Louisiana 271 Order* ¶ 187; *Texas 271 Order* ¶ 132; Finnegan/Connolly/Menezes Decl. ¶ 125.

environment.”⁸⁹ In addition, requiring CLECs to submit change requests to add products to SATE is not only unreasonable, given the cumbersome and time-consuming procedure involved (as demonstrated by the delays in implementation of AT&T’s two still-pending change requests to add products to SATE), but wholly unwarranted, since there is no reason why SATE should differ from actual production.⁹⁰

B. Qwest’s Interfaces Fail To Provide Nondiscriminatory Access.

In addition to the inadequacy of its change management process, including the absence of a suitable test environment, Qwest does not provide interfaces that provide CLECs with access to OSS functions equivalent to that which Qwest enjoys in its own retail operations.

Pre-Ordering. Qwest does not provide nondiscriminatory access to pre-ordering functions, even though the Commission has stated that “it is critical that a competing carrier be able to accomplish pre-ordering activities in a manner no less efficient and responsive than the incumbent.”⁹¹ First, Qwest has not shown that it provides CLECs with the ability to integrate EDI pre-ordering and ordering functions, and to integrate the EDI pre-ordering interface with their own back-office systems, fully and successfully – as it must, in order to meet the requirements of Section 271.⁹² In contrast to previous (and successful) section 271 applicants, Qwest presents no reliable evidence that real-world CLECs using EDI have attained full, successful integration of pre-ordering and ordering

⁸⁹ Finnegan/Connolly/Menezes Decl. ¶ 100.

⁹⁰ *Id.* ¶¶ 93-94, 102. Qwest cites the recent evaluation of SATE by Hewlett-Packard (“HP”) in Arizona as proof that “SATE is adequate to meet the Section 271 requirements.” Application at 151. The HP evaluation, however, was insufficient to demonstrate that SATE is adequate. HP did not conduct “production mirror testing” of Qwest’s IMA Release 9.0, even though HP concluded in a previous evaluation that there were “noteworthy discrepancies related to business rules consistency between the SATE and production systems.” Finnegan/Connolly/Menezes Decl. ¶ 117. HP also did not conduct comprehensive testing of the “VICKI” system that Qwest implemented to provide automated responses in SATE, or of the limited flow-through capability that Qwest had implemented in SATE. *Id.* ¶ 118. If anything, the HP evaluation showed that SATE is *not* adequate, since HP found that it could not conclude that SATE returns consistent messages, in view of the numerous errors that it had observed in the responses. *Id.* ¶ 120.

⁹¹ *New Jersey 271 Order* ¶ 33; *Georgia/Louisiana 271 Order*, App. D ¶ 34.

⁹² *See, e.g., Georgia/Louisiana 271 Order* ¶ 119 (BOC must give CLECs “the ability to transfer pre-ordering information (such as a customer’s address or existing features) electronically into the carrier’s own back-office systems and back into the BOC’s ordering interface”); *South Carolina 271 Order* ¶ 155 (a BOC is not providing equivalent access when the BOC’s retail operations use an integrated pre-ordering/ordering interface but “competing carriers cannot readily connect electronically the [pre-ordering] interface to their operations support systems or to [the BOC’s] EDI interface for ordering, notwithstanding their desire to do so”).

functions. Instead, Qwest relies primarily on third-party testing by Hewlett-Packard, on letters from two companies that design EDI interfaces for CLECs, and on a vague, three-sentence letter of a single CLEC that does not specify who developed the CLEC's alleged integration capability, when the capability was developed, or to what extent the CLEC has been able to integrate successfully.⁹³ Such evidence is plainly insufficient.⁹⁴ Moreover, HP's test report confirms that a CLEC would find it unreasonably difficult, if not impossible, to integrate EDI pre-ordering and ordering functions successfully.⁹⁵

In fact, the evidence shows that – in contrast to other RBOCs – Qwest has designed its parsed CSR such that the information in the service and equipment section of the CSR cannot efficiently and successfully be auto-populated into a local service request.⁹⁶ As a result of Qwest's unconventional design, AT&T has been required to populate such information manually into the LSR.⁹⁷

Furthermore, Qwest has failed to enable CLECs to effectively integrate the EDI pre-ordering interface with their own back-office systems. Qwest has designed its systems to validate addresses using a database (PREMIS) that is different from the database (CRIS) which serves as the source of the service address information on the customer service record ("CSR"). Because CLECs using the EDI pre-ordering interface use the service address information on the CSR to populate migration

⁹³ Application at 123; Finnegan/Connolly/Menezes Decl. ¶¶ 132-133.

⁹⁴ The Commission has never previously found a letter from a single CLEC, written in highly conclusory terms, to be a sufficient basis for concluding that CLECs "have been able to successfully integrate both pre-ordering and ordering." *See, e.g., Georgia/Louisiana 271 Order* ¶ 123 (finding that four CLECs had stated that they were able to integrate successfully); *Texas 271 Order* ¶¶ 154-155 & n.417 (finding that as many as three CLECs had integrated successfully, one of which had been submitting orders for at least ten months).

⁹⁵ *Id.* ¶¶ 134-135.

⁹⁶ Finnegan/Connolly/Menezes Decl. ¶¶ 136-138. RBOCs such as Verizon and BellSouth have designed their parsed CSR so that the information in the service and equipment ("S&E") section of the CSR is based on the end-user's telephone number ("TN"). This design enables the CLEC to locate the data in that section and populate the LSR in an efficient manner, since the LSR is also TN-oriented. *Id.* ¶ 136. By contrast, although it maintains the TN orientation for LSRs, Qwest has grouped information in the S&E section of the CSR based on the USOCs for the various products and services ordered by the customer. As a result of Qwest's design, CLECs using Qwest's CSR must parse the data in the S&E section to determine the applicable TN as well as the line-based features associated with that TN. This procedure requires the expenditure of considerable time and resources, since the CLEC must separately search for, and locate, the TN and each line-based feature associated with it. Because the procedure is so inefficient (particularly where the CLEC intends to offer service on a mass-market basis), AT&T instead simply displays the pages of the data in the S&E section and manually populates it into the LSR. *Id.* ¶¶ 137-138.

⁹⁷ *Id.* ¶ 138.

orders, and the address information in PREMIS and CRIS does not always match, CLECs either must experience frequent order rejections not experienced by Qwest's retail operations or – in order to reduce the possibility of order rejections – must obtain address information Qwest's GUI pre-ordering interface. Because the GUI cannot be integrated into a CLEC's own OSS, CLECs using the GUI must enter the same order information twice – once into the LSR and once into their own systems. This is clearly a denial of parity, given the fully integrated nature of Qwest's retail OSS.⁹⁸

Second, Qwest fails to provide nondiscriminatory access to loop qualification information, because it fails to provide CLECs with access to its LFACS system and all other databases that contain such information.⁹⁹ The “loop qualification tools” that Qwest provides (Application at 121-122) do not provide CLECs with all of the information to which Qwest has access, such as information on loop conditioning and spare facilities.¹⁰⁰ Third, Qwest does not provide CLECs with the same ability to perform (or have performed) mechanized loop testing before actual provisioning that Qwest itself has.¹⁰¹

Fourth, Qwest denies parity of access to due dates by changing due dates for CLEC orders far more frequently than for its own retail orders.¹⁰² The higher rate of postponed installations, and the resulting customer dissatisfaction, denies CLECs a meaningful opportunity to compete.¹⁰³

Ordering and Provisioning. Qwest also fails to provide nondiscriminatory access to ordering and provisioning functions. First, Qwest's systems are plagued by high rates of order

⁹⁸ Finnegan/Connolly/Menezes Decl. ¶¶ 139-141.

⁹⁹ When a BOC has compiled loop qualification information for itself, “it is required to provide requesting competitors with nondiscriminatory access to loop information within the same time frame whether it is accessed manually or electronically.” *Georgia/Louisiana 271 Order* ¶ 114. That obligation applies whenever “such information exists anywhere in [the BOC's] back office and can be accessed by any of [the BOC's] personnel,” regardless of whether the BOC's retail arm has access to that data. *Kansas/Oklahoma Order* ¶ 121.

¹⁰⁰ Finnegan/Connolly/Menezes Decl. ¶¶ 142-148.

¹⁰¹ *Id.* ¶¶ 149-155. CLECs need the ability to perform MLTs before a loop is provisioned in order to ensure the accuracy of the loop qualification information to which they have access. Qwest has performed “pre-order” MLTs in its retail operations in the areas where it would operate its “Megabit” service. *See id.*

¹⁰² *Id.* ¶¶ 156-158.

¹⁰³ *Id.* ¶ 158.

rejections, manual processing of electronically submitted CLEC orders, and manual errors.¹⁰⁴ Tellingly, Qwest’s Application fails to discuss rejection rates, or the percentage of all electronically submitted orders that actually flow through to its service order processor (“SOP”).¹⁰⁵ Qwest has good reason for its silence. Qwest’s systems reject nearly one-third of orders submitted by CLECs using the electronic Qwest interfaces, and those rejections result in delays in the provisioning of service to CLECs’ customers, and increase the CLECs’ costs.¹⁰⁶

Qwest’s total flow-through rates (*i.e.*, the rate of *all* non-rejected, electronically-submitted LSRs that flow through to the SOP without manual intervention) are equally abysmal. Depending on the type of order and the particular interface used, between 25 and 62 percent of all electronically submitted LSRs in Qwest’s region fall out for manual processing.¹⁰⁷ As shown below, the overall rates of manual processing in the four States that are the subject of Qwest’s Application ranged from 29.5 percent to 53.4 percent in May 2002.

State	Percentage of Total LSRs Manually Processed (May 2002)
Montana	29.5%
Utah	50.7%
Washington	39.5%
Wyoming	53.4%

Finnegan/Connolly/Menezes Decl. ¶ 175.¹⁰⁸

Manual processing, by nature, increases the likelihood of delays and errors in provisioning.¹⁰⁹ And KPMG’s third-party testing established that Qwest *does* commit numerous errors in manually

¹⁰⁴ *Id.* ¶¶ 162-200.

¹⁰⁵ *See id.* ¶¶ 164-167; Application at 130-131.

¹⁰⁶ Finnegan/Connolly/Menezes Decl. ¶¶ 164-167.

¹⁰⁷ *Id.* ¶ 170. Qwest’s Application discusses only one of its two measures of flow-through – PO-2B, which measures the percentage of all LSRs that Qwest has designed to flow through that actually flow through to the SOP without manual intervention. Qwest fails to mention the second flow-through measure (PO-2A), which is the rate of *all* electronically-submitted LSRs that flow through to the SOP without manual intervention, regardless of whether they are designed to flow through. *See* Application at 130-131; Finnegan/Connolly/Menezes Decl. ¶¶ 168-169.

¹⁰⁸ Qwest cannot validly attribute the high rates of rejection and manual fall-out to “CLEC errors.” For example, Qwest’s cumbersome ordering requirements and its failure to implement “telephone number migration” has increased the risk of order rejections. Finnegan/Connolly/Menezes Decl. ¶ 167. Moreover, beginning with March 2002 data, the flow-through rates reported by Qwest exclude all orders that fall out for manual processing due to CLEC errors. *Id.* ¶ 175 n.123

¹⁰⁹ *Id.* ¶ 162.

processing orders. Qwest, for example, cited human errors and/or inadequate training as a source of various problems noted in 75 exceptions and observations that KPMG issued during the ROC test.¹¹⁰ Despite Qwest’s assurance that it had implemented “training and quality assurance measures” to correct the human errors and inadequate training, KPMG continued to find manual errors on approximately 15 percent of the orders that it reviewed, resulting in KPMG’s issuance of another observation at the end of May (Observation 3110). Although KPMG found that further retesting was needed, Qwest requested that the observation be closed, rather than allow a retest.¹¹¹ KPMG’s Final Report thus expressed concerns about the “numerous problems with manually handled orders” during the test, and urged regulators to closely scrutinize Qwest’s flow-through performance in light of those problems.¹¹²

The manual error problems found by KPMG are compounded by the current inability of regulators to monitor the accuracy of Qwest’s manual processing on a regular basis. In the past, Qwest has not been required to report data on service order accuracy, or on the accuracy of the rejection notices that it sends manually to CLECs, in its performance reports.¹¹³ Although KPMG recommended the adoption of both metrics, Qwest agreed only to develop a PID for service order accuracy – which, as proposed by Qwest, is patently inadequate because it does not even cover codes that CLECs use on virtually every LSR.¹¹⁴ Given KPMG’s findings regarding the manual error problem, and the lack of well-established metrics to evaluate the adequacy of Qwest’s manual processing performance, Qwest cannot show that it gives CLECs a meaningful opportunity to compete.¹¹⁵

¹¹⁰ *Id.* ¶¶ 180-182.

¹¹¹ *Id.* ¶¶ 186-188

¹¹² *Id.* ¶ 180.

¹¹³ *Id.* ¶ 193.

¹¹⁴ *Id.* ¶¶ 194-195.

¹¹⁵ The self-serving “internal data” that Qwest includes in its Application (such as its purported data on “application date accuracy” and “manual rejects in error”) are so unreliable that they provide no support for Qwest’s assertion that its manual processing of CLEC orders is accurate. *See* Finnegan/Connolly/Menezes Decl. ¶¶ 196-199.

Second, Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete.¹¹⁶ Both KPMG’s test and Qwest’s reported performance data show that Qwest is not providing timely jeopardy notices to CLECs on a nondiscriminatory basis.¹¹⁷ Indeed, Qwest’s systems for returning status notices are so flawed that, for some of its orders, AT&T has received a firm order confirmation (“FOC”), followed by a rejection notice – a sequence that should never occur.¹¹⁸ In other instances, Qwest’s systems have returned rejection notices that never should have been issued, because there was no deficiency in the order.¹¹⁹ These problems put CLECs at a distinct disadvantage with the efficient, fully automated systems that Qwest uses in its retail operations.¹²⁰

Third, Qwest does not provision CLEC orders on a nondiscriminatory basis. KPMG’s Final Report, found that the provisioning intervals for UNE-P and resale orders are longer than those for Qwest’s own retail orders.¹²¹ Qwest has also shown itself unable to provision orders for dark fiber and EELs adequately.¹²²

Fourth, Qwest’s unreasonably long process for updating customer service codes (“CUS Codes”) in customer service records denies CLECs a meaningful opportunity to compete.¹²³ The delays in updating CUS codes effectively preclude CLECs from submitting any further orders on a

¹¹⁶See, e.g., *New Jersey 271 Order* ¶ 93 (describing timely receipt of status notices as “an important aspect of a competing carrier’s ability to serve its customers at the same level of quality as a BOC”).

¹¹⁷ Finnegan/Connolly/Menezes Decl. ¶¶ 205-207.

¹¹⁸See Finnegan/Connolly/Menezes Decl. ¶¶ 208-209. When AT&T brought this problem to Qwest’s attention, Qwest stated that it had sent a rejection notice because it had found an error in the order after it transmitted the FOC. In response to AT&T’s complaints, Qwest instituted a “workaround” under which it now manually returns a *jeopardy* notice, rather than a rejection notice, after sending a FOC. This “workaround,” however, requires AT&T to expend time and resources to resolve the issues raised by the jeopardy notice, and (like Qwest’s previous practice of sending a jeopardy notice) raises the risk of order cancellations. *Id.* ¶¶ 210-212.

¹¹⁹ *Id.* ¶¶ 213-214.

¹²⁰ *Id.* ¶ 214.

¹²¹ *Id.* ¶¶ 215-216.

¹²² *Id.* ¶¶ 218-224.

¹²³ *Id.* ¶¶ 225-230.

customer's account for days, thereby preventing CLECs from promptly honoring requests for additional services from newly-acquired customers.¹²⁴

Maintenance and Repair. As part of its OSS obligations, Qwest is required to provide access to maintenance and repair functions.¹²⁵ Qwest, however, has not done so. For example, repeat trouble report rates for CLEC customers have been higher than those for Qwest's own retail customers.¹²⁶ Moreover, as KPMG found, Qwest does not process CLECs' transactions to modify trouble reports in a timely manner; Qwest's rate of successful repairs is inadequate; and Qwest does not maintain accurate repair records for CLECs.¹²⁷ Each of these problems denies CLECs a meaningful opportunity to compete.¹²⁸

Billing. Qwest has not provided the nondiscriminatory access to billing functions that CLECs need in order to enable them to provide accurate and timely bills to their customers.¹²⁹ Specifically, Qwest has not met its obligation to provide "complete, accurate, and timely" daily usage files ("DUFs") or wholesale bills to CLECs.¹³⁰

Qwest's Application makes no attempt to show that its DUFs are accurate and complete. *See* Application at 137 (describing only data on timeliness of DUFs).¹³¹ However, KPMG's test shows that Qwest's systems do not, and cannot, return complete and accurate DUFs. Qwest failed KPMG's test for DUF accuracy and completeness *five separate times* before it finally (and barely) passed on

¹²⁴ *Id.* ¶¶ 225-227. The delays that are caused by the lengthy CSR updating process appear to have been reduced to some extent by a "workaround" that Qwest implemented (without advising AT&T, which learned of the "workaround" only through happenstance in January 2002). *Id.* The workaround, however, requires AT&T to expend additional time and resources, without any assurance from Qwest that (like other RBOCs) it will implement an automated process that updates CUS Codes in real time. *Id.*

¹²⁵ *Georgia/Louisiana 271 Order*, App. D ¶ 38; *New York 271 Order* ¶ 212.

¹²⁶ Finnegan/Connolly/Menezes Decl. ¶ 232.

¹²⁷ *Id.* ¶¶ 233-239.

¹²⁸ *Id.*

¹²⁹ *See New Jersey 271 Order* ¶ 121; *Georgia/Louisiana Order*, App. D ¶ 39.

¹³⁰ *New Jersey 271 Order* ¶ 121.

¹³¹ Qwest's reported monthly performance data do not include data regarding the accuracy and completeness of DUFs. Finnegan/Connolly/Menezes Decl. ¶ 245.

the sixth try.¹³² This constant series of failures calls the reliability of Qwest's systems into serious question, particularly since it appears that Qwest has no effective mechanisms to verify DUFs for accuracy and completeness before sending them to CLECs.¹³³

AT&T's carrier-to-carrier testing with Qwest in Minnesota showed similarly deficient performance by Qwest. For example, in the second (and final) phase of the test, Qwest failed to return more than 40 percent of the DUFs that it was required to send, and committed errors on more than 30 percent of the access DUFs that AT&T actually received.¹³⁴

Similarly, the wholesale bills that Qwest provides are inadequate to meet the requirements of Section 271. Qwest "must demonstrate that it can produce a readable, auditable and accurate wholesale bill in order to satisfy its nondiscrimination requirements under checklist item 2."¹³⁵ Qwest's wholesale bills, however, are not auditable, because they are not generated using the industry standard CABS system and BOS/BDT format – which would "permit[] a wholesale carrier to use computer software to readily audit the data."¹³⁶ Instead, Qwest generates wholesale bills using the non-standard Customer Record Information System ("CRIS"). Despite its promise to implement CABS BOS BDT billing on July 1, 2002, Qwest implemented only the BOS BDT format on that date – and continues to generate bills using CRIS.¹³⁷ Because Qwest still uses a non-industry-standard system, CLECs cannot use currently available software to audit the electronic bill.¹³⁸ As a practical matter, this renders CLECs unable to audit Qwest's wholesale bills, because attempting to use paper

¹³² Finnegan/Connolly/Menezes Decl. ¶ 243.

¹³³ Finnegan/Connolly/Menezes Decl. ¶¶ 243-244. For example, it appears that in each of the tests that it failed, Qwest was totally unaware of the inaccurate and incomplete nature of the DUFs that it was sending to KPMG's pseudo-CLEC until it was advised of the problem by KPMG – including KPMG's first such test, when Qwest was failing to return more than 30 percent of the expected DUFs. *Id.* ¶ 244. Qwest's revisionist description of the KPMG testing as involving failures of "only" three, rather than five, tests is both incorrect and beside the point. *Id.* ¶ 243 n. 181; Application at 140.

¹³⁴ Finnegan/Connolly/Menezes Decl. ¶¶ 245-248.

¹³⁵ *New Jersey 271 Order* ¶ 124; *Pennsylvania 271 Order* ¶ 22.

¹³⁶ *New Jersey 271 Order* ¶ 122 n.148.

¹³⁷ *Id.* ¶¶ 251-259.

¹³⁸ *Id.* ¶¶ 262-263.

bills to verify the accuracy of Qwest's charges would be prohibitively expensive and time-consuming.¹³⁹

Qwest's wholesale bills are also not accurate. In its Final Report, KPMG noted its "repeated receipt of erroneous bills" from Qwest and concluded that it was unable to determine whether Qwest was adhering to its wholesale billing processes.¹⁴⁰ Qwest's wholesale bills to AT&T have persistently contained errors, most of which have continued to appear in AT&T's bills even after months of discussions between Qwest and AT&T.¹⁴¹ Finally, Qwest's own reported data on billing accuracy and bill completeness confirm that it falls well short of meeting its obligation to provide nondiscriminatory access.¹⁴²

C. The Performance Data Upon Which Qwest Relies Are Inaccurate.

As this Commission has stated, "the reliability of reported data is critical" and "the credibility of the performance data must be above suspicion."¹⁴³ Qwest simply cannot satisfy this requirement.

Contrary to Qwest's claims, the Liberty PMA did not validate the accuracy of Qwest's performance data. During that audit, Liberty assumed that Qwest's raw data inputs were accurate. Based upon that assumption, Liberty then assessed whether Qwest properly applied the business rules governing the metrics when calculating performance results.¹⁴⁴ As a consequence, that audit was never intended to serve as a robust analysis of the integrity of Qwest's data.

Nor can Qwest seek refuge in the Liberty data reconciliation process as proof of the accuracy and reliability of its performance data. The Liberty data reconciliation process was extremely limited in scope and was riddled with so many deficiencies that it could not possibly be characterized as a reliable indicator of the accuracy of Qwest's data.¹⁴⁵ The Liberty data reconciliation involved an

¹³⁹ *Id.* ¶ 255. The electronic CRIS BOS BDT bills that Qwest has provided to AT&T since July 1, 2002, have already proven to be flawed, even after Qwest resubmitted them to correct flaws that it acknowledged. *Id.* ¶¶ 260-261.

¹⁴⁰ *Id.* ¶ 265.

¹⁴¹ *Id.* ¶¶ 266-267.

¹⁴² *Id.* ¶ 268.

¹⁴³ *Texas 271 Order* ¶¶ 428-429.

¹⁴⁴ Finnegan Performance Data Decl. ¶ 22.

¹⁴⁵ *Id.* ¶ 19-77.

examination of data generated more than a year ago by three CLECs for seven measures covering three products. No data were examined from two of the states included in Qwest's Application.¹⁴⁶

The Liberty data reconciliation process was also procedurally and substantively flawed. The study objective inappropriately placed the burden on the CLECs to prove that Qwest's data were inaccurate. Worse yet, Liberty failed to engage in military style testing and prematurely closed observations without determining whether Qwest had eliminated the numerous errors in its performance monitoring and reporting processes that Liberty had identified.¹⁴⁷ However, even Liberty's flawed study reveals that Qwest's performance results are not trustworthy.¹⁴⁸

Similarly, the KPMG data reconciliation process conducted during the ROC OSS test lends no support to Qwest's claim that its data are accurate and reliable. For a variety of reasons, KPMG was unable to render findings on numerous test criteria. Many of these test criteria were governed by diagnostic measures as to which no parity or benchmark standard has been developed.¹⁴⁹ As a result, KPMG simply calculated performance results without reaching a determination as to whether Qwest satisfied test criteria or whether any apparent deficiencies in its performance had any competitive impact. With respect to other test criteria, KPMG was unable to render findings because Qwest refused to be subjected to the rigors of additional testing.¹⁵⁰ However, even the KPMG data reconciliation process revealed that Qwest's performance monitoring and reporting processes are plagued with problems due to human error during the manual processing of orders.¹⁵¹ Thus, if anything, the KPMG data reconciliation undercuts Qwest's claims of data integrity.

Qwest's reliance on the CGE&Y PMA as proof of the reliability of its data is also misplaced. The CGE&Y PMA did not test the accuracy of Qwest's raw data inputs. The test plan for that audit contemplated that the accuracy of Qwest's input data would be evaluated in the Functionality and

¹⁴⁶ *Id.* ¶¶ 28-33.

¹⁴⁷ *Id.* ¶¶ 34-36, 39-72.

¹⁴⁸ *Id.* ¶ 77.

¹⁴⁹ *Id.* ¶¶ 79-82.

¹⁵⁰ *Id.* ¶¶ 85-99.

Capacity test during which Qwest's data would be compared against that collected from the Pseudo-CLEC. However, this aspect of the test was fatally compromised because of the failure of the testers to obtain data from the Pseudo-CLEC. As a result, Qwest's input data were never validated during this audit.¹⁵²

Moreover, even Qwest's inadequate commercial data show that CLECs are subjected to high rejection rates and low flow-through rates which increase the risk of error and provisioning delay. Qwest's own recorded data show that it fails to issue timely status notices and discriminates against CLECs during the provisioning, maintenance and repair and billing processes.¹⁵³

III. QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

It is quite obvious that the Montana, Wyoming, Utah and Washington commissions failed to apply TELRIC principles and approved UNE rates that far exceed any reasonable TELRIC range. The Washington commission adopted switching rates for Qwest based on *Verizon-specific* switching data from 1994. And the loop rates adopted by the commission are based on a black-box amalgam of three cost models, all of which the Washington commission conceded violated TELRIC principles. In Utah, the state commission, after rejecting Qwest's recurring cost models as non-TELRIC, ultimately adopted recurring rates that are based on those cost models. The Wyoming commission initially tried to set cost-based rates. But under Wyoming state law, the incumbent carrier is permitted to reject rates adopted by a state commission. Qwest exercised this right, and ultimately obtained much higher UNE rates from the beaten down Wyoming commission. And the stipulated rates in Montana contain the express disclaimer that "[n]o party's position in this docket is accepted by the other parties by virtue of their entry into this Stipulation, nor does it indicate their acceptance, agreement or concession to any rate-making principle, cost of service determination, or pricing

¹⁵¹ *Id.* ¶¶ 92-93.

¹⁵² *Id.* ¶¶ 100-102.

¹⁵³ *Id.* ¶¶ 130-193.

principle embodied, or arguably embodied, in this Stipulation.” Understandably, Qwest makes only a token effort to defend the state-approved rates.

Instead, Qwest points to its own last minute rate reductions claims that the Montana, Utah, Washington, and Wyoming rates, as reduced, satisfy the Commission’s benchmarking analysis, using Colorado as the benchmark state. Qwest implemented these unilateral rate reductions only a month before filing the joint application. To a large extent, they are only temporary reductions, and are expressly subject to change. Qwest has offered the Commission no assurances that CLECs will continue to have access to the new rates implemented by Qwest after this proceeding is completed. Nor can the Commission rationally rely on the state commissions to ensure that Qwest’s recurring and non-recurring rates will be set at cost-based levels in future rate proceedings – in the more than six years since the Act was passed, these states have *never* established TELRIC-compliant rates.

On this record, Qwest’s application must be rejected. Qwest should refile its application only after Qwest and the state commissions in Montana, Utah, Washington and Wyoming demonstrate a commitment to setting and maintaining TELRIC-compliant rates. Absent such assurances, the competitive local entry envisioned by the 1996 Act cannot take place. Even if, contrary to fact, Qwest’s temporarily discounted rates were sufficient to support local entry, CLECs cannot reasonably implement entry plans based on those rates, because neither Qwest nor the state commissions have demonstrated any commitment to maintaining them. There is nothing to stop Qwest and the state commissions from returning Qwest’s rates to the same high levels that existed before Qwest’s last minute reductions. Indeed, in Utah Qwest has already proposed to do exactly that – in the ongoing Utah pricing proceeding, Qwest has proposed to set rates that are at the same levels as the rates that were in place prior to reductions implemented by Qwest as window dressing for its section 271 application.¹⁵⁴

¹⁵⁴ See Lieberman/Pitkin Decl. ¶ 55 (showing that prior to Qwest’s rate reductions, the margins available to new entrants in Utah were insufficient to support local entry).

Qwest's benchmarking approach is also flawed because it relies on an inappropriate benchmark state. Unlike any previous application reviewed by the Commission, Qwest has chosen to rely on a state (Colorado) that has not yet received section 271 approval as the benchmark against which to assess the rates in the rates in the four states in its Application. The Commission's benchmarking analysis is a short-cut to assessing TELRIC-compliance. A necessary prerequisite of that short-cut is that the Commission has already found the rates in the benchmark state to be TELRIC-compliant. The Commission has made no such finding here.

Using a state that is itself undergoing the Section 271 process (Colorado) as the benchmark state also raises serious due process issues. Qwest has chosen to defend its Application primarily on the grounds that the rates in the four states in its Application pass the Commission's benchmarking test, using Colorado as the benchmark state. But only a few days before initial comments are due to be filed in this proceeding, Qwest announced that it plans to make several changes to its Colorado rates, and corresponding changes to the rates in the four states in its instant Application. Qwest has conceded that the Colorado rates are not, in fact, TELRIC-compliant, and is now trying to address the serious problems with those rates. Qwest has not yet filed a new Colorado SGAT, or new rates in any of the four states in its application. When Qwest does finally begin filing a new set of rates in this proceeding, commenters will be forced to respond to Qwest's new rates *du jour* outside of the normal comment cycle, and with little assurance that Qwest will not again move the target by again changing its Colorado rates. To avoid these serious concerns, the Commission should enforce its complete when filed rule, and restart the 90-day review period when Qwest files its new SGATs for Colorado and the four states in its application.

Even if Qwest's benchmark rates were not a moving target, and Qwest irrevocably committed that its last minute rate reductions will not be undone once it obtains interLATA authority, its showing would still be inadequate. Qwest has made no serious attempt to defend the rates in Montana, Utah, Washington, and Wyoming on the merits. And Qwest's benchmarking analysis is fundamentally flawed because it relies on national average usage assumptions rather than state-

specific usage assumptions, and also fails to account for the fact that the Commission's Synthesis cost model is a poor indicator of non-loop cost differences between very rural states (*e.g.*, Wyoming and Montana) and less rural states (*e.g.* Colorado). When the benchmarking comparisons are done properly, Qwest's Washington and Utah non-loop rates are as much as 14% higher than Colorado rates, on a fully cost-adjusted basis, and Qwest's switching rates in the more rural states (Montana and Wyoming) are as much 52% higher than those in Colorado, on a cost-adjusted basis.

In any event, Qwest's rates could not be found to be TELRIC-compliant in any of the four states, because Qwest's Colorado UNE rates are themselves inflated by clear TELRIC errors. Qwest's NRC cost model contains TELRIC errors that substantially inflate NRCs that are critical for CLEC entry – *e.g.*, hot cut NRCs and basic loop install NRCs – by more than 100%. Likewise, Qwest's Colorado recurring UNE loop rates are inflated by clear TELRIC errors. Although the Colorado PUC correctly relied primarily on the HAI Model to compute UNE loop rates, it adopted numerous non-TELRIC-compliant inputs that vastly inflated Qwest's UNE loop rates. The result is a classic case of garbage in, garbage out. These clear TELRIC errors inflate Qwest's UNE loop costs by more than \$2.00. In addition, Qwest's Colorado recurring switching rates are substantially overstated. The Colorado PUC initially decided to ignore the evidence submitted in the most recent cost proceeding and simply to maintain Qwest's old patently unlawful switching rates. Recognizing that those massively inflated switching rates would not satisfy Checklist Item Two, Qwest proposed lower switching rates. However, the reduced rates Qwest submitted were based on non-TELRIC-compliant inputs that the Colorado PUC never found to be TELRIC compliant. Rather, the Colorado PUC approved Qwest's proposals solely on the ground that they reduced rates from existing levels.

Finally, even aside from the problems discussed above, there is separate and independent evidence that the UNE rates in Montana and Washington violate Checklist Item Two. Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, intraLATA toll contributions, and state and federal universal service revenues – revenues are not sufficient to cover an efficient new entrant's costs in those states. Moreover, even

accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry. Thus, Qwest's UNE rates in Montana and Washington are discriminatory in violation of Checklist Item 2.¹⁵⁵

Local entry in Wyoming and Montana also is foreclosed by Qwest's anticompetitive deaveraging methodology. Qwest and the state commissions in Wyoming and Montana implemented a deaveraging methodology that makes it virtually impossible for potential entrants to determine which customers are located in which UNE rate zones.¹⁵⁶ Consequently, potential new entrants must request that information from Qwest on a customer-by-customer basis.¹⁵⁷ This problem inhibits local entry in two ways. First, because the revenues available to new entrants varies widely from UNE zone to UNE zone, the inability to determine which potential customers are located in which UNE zone (except on a case-by-case basis) makes it difficult, if not impossible, to develop and implement an effective entry strategy. Second, because Qwest knows exactly where CLECs intend to enter – indeed, CLECs must request customer UNE zone information directly from Qwest – Qwest has the anticompetitive incentive and ability to misuse this highly sensitive business plan information to target CLEC customers.

A. Qwest's Montana, Utah, Washington and Wyoming UNE Rates Do Not Satisfy The Commission's Benchmarking Analysis, Using Colorado As The Benchmark State.

Loop Benchmarking. The Commissions should reject Qwest's loop benchmarking analysis for Montana and Wyoming out of hand, because the benchmarking analysis masks the underlying TELRIC errors. The purpose of the benchmarking analysis is to evaluate the potential impact of TELRIC violations, and to make a determination as to whether those violations inflate rates above the range that a reasonable application of TELRIC principles would have produced. Because the

¹⁵⁵ As demonstrated below, the fact that Qwest's UNE rates in these states preclude competitive local entry also shows that a grant of Qwest's applications would contravene the public interest.

¹⁵⁶ See Lieberman/Pitkin Decl. ¶ 56.

¹⁵⁷ See *id.*

Commission's benchmarking analysis aggregates UNE rates for all UNE zones, the benchmarking analysis cannot be used to assess the impact of clear TELRIC errors in the deaveraging methodology. The Commission's benchmarking analysis compares state-wide average UNE rates and, therefore, masks the clear TELRIC-errors in the deaveraging process.¹⁵⁸

There are, in fact, serious clear TELRIC errors in the methodology used to develop UNE rate zones in Montana and Wyoming.¹⁵⁹ The UNE rate zones in Montana and Wyoming are basically concentric circles formed around wire-centers, where the innermost circle is the lower-cost UNE rate zone, and the outmost circle is the higher-cost UNE rate zone. That means that a CLEC serving a customer near a wire center located in the middle of a city must pay the same UNE rate as a customer located near a wire center located on the top of an isolated mountain. Because these costs vary by geography and demography, there is no question that Qwest's Montana and Wyoming UNE loop rates are not cost-based, and do not comply with Checklist Item 2. And because the Commission's benchmarking analysis does not account for that problem and, in fact hides that problem, the Commission cannot rely on a benchmarking "short-cut" to assess whether the UNE rates in Montana and Wyoming are TELRIC-compliant.¹⁶⁰

On this record, there is no question that Qwest's Montana and Wyoming UNE loop rates are not cost-based, and do not comply with Checklist Item 2. Qwest's loop benchmarking analysis masks this plain deficiency in Qwest's rates, because the loop benchmarking is based on a state-wide average that does not reflect the fact that the loop rates that entrants must actually pay to Qwest in Montana and Wyoming are not remotely cost-based. Thus, a benchmarking approach cannot justify the non-TELRIC loop rates in Wyoming and Montana.

Switching Benchmarking. There is no question that Qwest's non-loop benchmark analysis is flawed. Qwest's non-loop rates in all four states fail the Commission's benchmarking analysis

¹⁵⁸ See Lieberman/Pitkin Decl. ¶¶ 6-7.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

because Qwest’s comparisons improperly rely upon national average “minutes of use” that do not reflect the relevant actual minutes of use for each state.¹⁶¹ Because Qwest’s non-loop benchmarking analysis starts with the “wrong” number of minutes – which even Qwest concedes drives the results of its benchmarking analysis – Qwest’s analysis ends with the wrong benchmark results.¹⁶² With a properly conducted benchmarking analysis – using state-specific minutes – Qwest’s non-loop rates in Washington and Utah, on a cost adjusted basis, exceed those of Colorado by 8% and 14%, respectively.¹⁶³ Qwest’s analysis also fails to account for the fact that the Commission’s Synthesis cost model is a poor indicator of non-loop cost differences between very rural states (*e.g.*, Wyoming and Montana) and less rural states (*e.g.* Colorado). With a properly conducted benchmarking analysis – using state-specific minutes and addressing the issues relating to the Synthesis Cost Model – Qwest’s switching rates in Wyoming and Montana, on a cost adjusted basis, exceed those of Colorado by 32% and 52%, respectively.¹⁶⁴

Minutes of Use. As demonstrated in the attached declaration of Michael Lieberman and Brian Pitkin, a benchmarking analysis using state-specific minutes of use conclusively shows that the switching rates in all four states (and total non-loop rates in two of the four states) fail the Commission’s benchmarking test.¹⁶⁵ Not surprisingly, Qwest’s benchmarking analysis relies on a different set of minutes, that Qwest concedes are not state-specific. Qwest defends its use of non-state-specific minutes by pointing out that benchmarking comparisons require the state-specific minutes data (available from ARMIS) to be divided between interoffice and intraoffice minutes, and noting that Qwest has not made data showing that state-specific allocation available to CLECs or to the Commission.¹⁶⁶ Because AT&T and other CLECs do not have access to Qwest’s state-specific interoffice vs. intraoffice minutes of use allocations, Qwest contends that a benchmarking

¹⁶¹ See Lieberman/Pitkin Decl. ¶ 10-17.

¹⁶² See *id.*

¹⁶³ See *id.* ¶ 22.

¹⁶⁴ See *id.* ¶ 24.

¹⁶⁵ See *id.* ¶ 10-17.

comparison which uses state-specific total minutes and estimated state specific intraoffice/interoffice allocations is imperfect. The Commission has no choice in these circumstances, Qwest concludes, but to rely upon Qwest's national average-based comparisons. The Commission should give Qwest's argument no weight.

As an initial matter, the premise of Qwest's claim – that allocating state-specific minutes using non-state-specific (but reasonable) allocation assumptions might change the outcome of the benchmarking analyses in this proceeding – is wrong. In reality, changing the allocations that are applied to the state-specific minutes does not change the conclusions of any of the benchmarking analyses. Whether 100% or 0% of state-specific minutes are allocated to intraoffice minutes, the results of the benchmarking analyses are the same – all four states fail.¹⁶⁷ Because the actual state-specific allocations are obviously somewhere between 0% and 100%, there is no question that Qwest's analysis would flunk a fully state-specific benchmarking analysis.

There also are other fundamental reasons to reject Qwest's claims. It is *Qwest's* burden to establish that its rates in the other states compare favorably to its benchmark state on a cost-adjusted basis. If Qwest chooses not to supply the Commission and the parties with the allocation data, then it cannot take advantage of the benchmarking shortcut. And if benchmarking is to be done in the face of Qwest's refusal to provide the actual allocation data, reasoned decision making and the Commission's own decisions require that it be done on the basis of the best available state-specific information.

As the Commission has explained, "UNE rates are set by state commissions based on state-specific costs divided by total demand. The UNE rates therefore necessarily reflect state-specific MOU and traffic assumptions. Use of state-specific MOU per-line and traffic assumptions to develop per-line per-month UNE-platform prices for a benchmark state and an applicant state is therefore

¹⁶⁶ See *Qwest July 22 Ex Parte Letter* at 3.

¹⁶⁷ See Lieberman/Pitkin Decl. ¶ 11.

consistent with the manner in which states establish the UNE-Platform rates.”¹⁶⁸ These Commission findings unambiguously confirm that the use of state-specific minutes of use produce far more accurate benchmarking results than do national average minutes. The Commission’s benchmarking analysis is supposed to be an objective short cut test to assess whether an applicant state’s rates fall within a reasonable range of TELRIC-compliance. To allow applicants to pick-and-choose the minutes of use on which to pin their applications – which can greatly affect that analysis – would allow applicants to game the system, and would make a mockery of the entire Section 271 applications process.

The fact that Qwest has not made its state-specific interoffice/intraoffice allocations available for the purposes of conducting a fully state-specific benchmarking analysis certainly does not mean that a better approach is to abandon *all* state-specific minutes of use data, and base the benchmarking approach on national minutes of use assumptions and national interoffice/intraoffice minutes allocations that are necessarily wrong.¹⁶⁹ On the contrary, to the extent that non-state-specific assumptions are necessary under either approach, common sense and basic mathematics dictate that a benchmarking analysis which starts with state-specific total minutes of use would more accurately reflect relative costs than an analysis that relies on *neither* state-specific total minutes, nor state-specific interoffice/intraoffice allocations.¹⁷⁰

Qwest attempts to justify its use of national average minutes in its benchmarking analysis on the grounds that in some cases, the national average minutes data produce greater state-to-state cost-adjusted rate differences than would be produced by the state-specific data, and in other cases the national average minutes data produce lower state-to-state cost-adjusted rate differences than

¹⁶⁸ See *New Jersey 271 Order* ¶ 53.

¹⁶⁹ See Lieberman Qwest I Reply Decl. ¶ 20 (attached hereto as Attachment 7).

¹⁷⁰ See *id.* Qwest has also claimed that the fact that AT&T’s benchmarking analysis fails to reflect state-specific allocations of minutes between originating and terminating calls, and between calls to an access tandem and calls direct to a POP. As explained in the testimony submitted by Mr. Lieberman in reply to that baseless claim, those allocations have little, if any, impact on the results of the benchmark analysis. See Lieberman Qwest I Reply Decl., n.1.

produced by the state-specific data.¹⁷¹ Qwest also points out that the relative difference in the national average and state-specific benchmarking analysis may vary from year to year (because the total number of minutes varies from year to year).¹⁷² But that is precisely why the more accurate state-specific data must be used – it would be entirely arbitrary to endorse Qwest’s position that an RBOC can choose whichever data is most beneficial with respect to the particular states and at the particular times that the RBOC chooses to file applications.¹⁷³ And Qwest has clearly employed such gamesmanship here. Using state-specific minutes-of-use, and state-specific estimates for the allocation of those minutes shows that Qwest’s Washington and Utah non-loop rates fail the Commission’s benchmarking analysis.¹⁷⁴ On the other hand, Qwest’s flawed non-loop benchmarking analysis – which is based on national minutes – produces distinctly more favorable results for Qwest.

Qwest’s false claim that the use of national average minutes to conduct a benchmarking analysis does not benefit Qwest also is irrelevant (in addition to being patently false). The purpose of the Commission’s benchmarking analysis is to determine whether rates in a particular state are within some reasonable range of the rates in another state. The proper methodology for conducting that analysis does not depend on whether one methodology systematically produces higher or lower results than a competing methodology. Rather, the proper methodology is that which systematically produces the most accurate results. As recognized by this Commission in the *New Jersey 271 Order* (¶ 53), the most accurate benchmarking analysis is that which is based on state-specific minutes, and if necessary state-specific assumptions relating to the allocation of those minutes.

Accounting For Rural States. The second fundamental error in Qwest’s benchmarking analysis is that it fails to account for the fact that the Commission’s Synthesis cost model is a poor indicator of non-loop cost differences between very rural states (*e.g.*, Wyoming and Montana) and less rural states (*e.g.*, Colorado) because the Synthesis Cost Model substantially overstates non-loop

¹⁷¹ See *Qwest July 22 Ex Parte Letter* at 3-5.

¹⁷² See *id.*

¹⁷³ See Lieberman/Pitkin Decl. ¶ 15.

costs in rural states relative to less rural states, thereby substantially overstating any such cost justification for non-loop *rate differences*.¹⁷⁵ The primary reason that the Synthesis Cost Model overstates non-loop cost differences between very rural and less rural states is that the Synthesis Cost Model vastly overstates cost differences for transport and for tandem switching (non-loop costs are equal to the sum of the costs of switch port, switch usage, switch features, *transport*, signaling, and *tandem switching*).¹⁷⁶ Therefore, to the extent that any switching-related benchmark analysis between rural states (*e.g.*, Wyoming and Montana) and less rural states (*e.g.*, Colorado) is appropriate, that analysis should at least exclude the costs of transport and tandem switching.¹⁷⁷ And that analysis confirms that Qwest's Wyoming and Montana switching rates cannot be justified by a comparison to Qwest's Colorado switching rates. Qwest's Wyoming and Montana switching rates (based on state-specific minutes) are 32% and 52% higher, on a cost adjusted basis, than those in Colorado, respectively.¹⁷⁸

Moreover, the fact that Qwest's Wyoming and Montana switching rates are higher than in Colorado on a cost adjusted basis is fatal to Qwest's claim that its rates can be rubber-stamped by this Commission for a second independent reason. As noted, "TELRIC rates are calculated on the basis of *individual* elements." *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1678 (2002) (emphasis added). Hence, a BOC's rates for a network element comply with Checklist Item 2 only if they are "based on the cost . . . of providing . . . *the* network element." 47 U.S.C § 252(d)(1) (emphasis added). Therefore, to gain section 271 approval, a BOC must show that the rates for *each* of its network elements – including switching – comply with TELRIC principles. Because Qwest's switching rates cannot be justified based on a valid benchmark comparison, Qwest must prove, not simply assert, that its Wyoming and Montana switching rates are TELRIC-compliant. Qwest has not

¹⁷⁴ *See id.*

¹⁷⁵ *See id.* ¶¶ 17-23.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.* ¶ 24.

¹⁷⁸ *See id.*

done so, and as demonstrated below, Qwest cannot show that its switching rates are TELRIC-compliant. On the contrary, Qwest's Wyoming and Montana switching rates are inflated by myriad clear TELRIC errors.

The bottom line is this: a properly conducted benchmarking analysis confirms that Qwest's non-loop rates in Washington and Utah are higher, on a cost-adjusted basis, than those in Colorado by 8% and 14%, respectively. And Qwest's switching rates in Montana and Wyoming exceed those in Colorado on a cost-adjusted basis by 52% and 32%, respectively. Thus, contrary to Qwest's claims, its switching rates in those states do not satisfy the Commission's benchmarking analysis.

B. Qwest's Washington, Utah, Montana and Wyoming UNE Rates Can Not Be Found TELRIC-Compliant On Their Own Merits.

Because Qwest cannot justify its Washington, Utah, Montana and Wyoming rates by comparison to Colorado rates, Qwest must defend the four states' rates on their own merits. Qwest barely attempts to do so. That is because the state commission orders confirm that these states did not apply TELRIC principles. Moreover, even if those state commissions had endeavored to apply TELRIC principles (and had succeeded in that endeavor), the cost proceedings in those states generally took place in 1997 and 1998, and relied on even earlier cost data. Thus, even if Qwest's UNE rates in those states were TELRIC-compliant when they were set – which they were not – those rates would not be TELRIC-compliant today.¹⁷⁹ And because Qwest's non-loop rates in Washington, Utah, Montana and Wyoming do not compare favorably to Colorado, Qwest cannot demonstrate

¹⁷⁹ Section 271 is framed in the present tense and requires a showing that the UNE rates proposed in the application are cost-based at the time of the application. For example, § 271(c)(2)(A) provides that the relevant inquiry is whether the applicant “*is* providing access and interconnection . . . [that] meets the” checklist requirements. (emphasis added). In addition, checklist item 2 requires that a BOC must provide “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)” of the Act. § 271(B)(ii). Section 251(c)(3) requires incumbent LECs to provide “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that *are* just, reasonable, and nondiscriminatory.” (emphasis added). Section 252(d)(1) further provides that state commission rate determinations “for network elements . . . *shall be* . . . based on the cost . . . of providing the . . . network element.” (emphasis added). See also 47 C.F.R. § 51.503(a) (“An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that *are* just, reasonable, and nondiscriminatory”) (emphasis added); *id.* at § 51.507(a) (“Element rates shall be structured consistently with the manner in which the costs of providing the elements *are* incurred”) (emphasis added). Thus, the fact that Qwest's UNE rates cannot possibly be TELRIC-compliant today confirms Qwest has failed to satisfy Checklist Item Two.

(and, in any event, has not attempted to demonstrate) that its recent arbitrary rates reductions have eliminated the inflation caused by the many clear TELRIC errors.

1. Qwest's Washington Rates Are Inflated By Numerous Clear TELRIC Errors.

The UNE rates adopted by the Washington Utilities and Telecommunications Commission (“WUTC”) reflect clear TELRIC errors and are not within a reasonable TELRIC range. The rates adopted by the WUTC are the result of two separate pricing proceedings (“Phases”). In Phase I, the WUTC purported to determine Qwest’s (then US WEST’s) forward-looking recurring loop and switching costs, net of common costs.¹⁸⁰ In Phase II, the WUTC adopted a “common cost factor” to increase the recurring and loop and switching costs developed in Phase I in order to account for the common costs associated with those elements. In the Phase II proceeding, the WUTC adopted recurring loop and switching rates for Qwest equal to the Phase I costs grossed up by the common cost factor adopted in Phase II.¹⁸¹

The WUTC committed numerous clear errors in both Phase I and in Phase II that vastly inflated the recurring switching and loop rates that would be produced by any reasonable application of TELRIC principles.¹⁸² Even Qwest recognized that these inflated recurring rates would not pass muster and has therefore unilaterally lowered those rates in order to “expedite consideration of Qwest’s Section 271 application.” *See* Thompson WA Decl. ¶ 9. But the rate reductions are entirely arbitrary and unsupported and there could be no reasoned Commission finding that the reductions were enough to offset the effects of the many TELRIC errors discussed below.¹⁸³

Washington Loop Rates. There is no question that the methodologies used by the WUTC to develop Qwest’s Washington recurring loop rates violated numerous TELRIC rules.

¹⁸⁰ *See* Eighth Supplemental Order, Interim Order Establishing Costs for Determining Prices in Phase II; And Notice of Prehearing Conference, *Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket Nos. UT-960369, -960370, -960371 (May 11, 1998) (“*Phase I Order*”).

¹⁸¹ *See* 17th Supplemental Order, Interim Order Determining Prices; Notice of Prehearing Conference, *Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket Nos. UT-960369, -960370, -960371 (September 23, 1999) (“*Phase II Order*”).

¹⁸² *See* Mercer/Fassett Decl. ¶ 16.

Phase I. The WUTC’s purported purpose of the Phase I proceeding was “to develop an appropriate and consistent cost methodology with which to determine the costs of providing certain telecommunications services.”¹⁸⁴ Three cost models were presented to the WUTC: (1) Sprint submitted the Benchmark Cost Proxy Model (“BCPM”); (2) Qwest submitted its Regional Loop Cost Analysis Program (“RLCAP”); and (3) AT&T submitted the Hatfield Model.¹⁸⁵ The WUTC adopted none of these cost models. The WUTC emphasized that the RLCAP cost study “is inflexible, closed, and uses inputs for buried cable and utilization rates that are inconsistent with [Qwest’s] actual operations” and that the “BCPM inputs are based upon a proprietary study of LEC operations, thus violating the [WUTC] . . . requirement for the use of open models, its use of per line expenses for outside plant is not economically sound, and it has at least one algorithmic error.”¹⁸⁶

The BCPM and RLCAP cost studies plainly contained myriad clear TELRIC errors. With respect to the BCPM, even the WUTC was troubled by the model’s assumptions: “we find troublesome the method used to develop the BCPM inputs. The input values are based on a proprietary survey that was not made available to other parties. Furthermore, the mix of activities is based on the opinion of an industry group.”¹⁸⁷

The Commission has expressly rejected the underlying methodology employed by the BCPM to calculate loop costs, as well as many of the default inputs used in that model. In the *Platform Order*, 13 FCC Rcd. 21323 (1998), this Commission found that the HAI model’s approach for determining how to “group and serve . . . customers in an efficient and technologically reasonable manner” was superior to BCPM’s “simplist[ic]” approach that “generat[e]d artificial costs.”¹⁸⁸ In particular, the Commission found BCPM’s methodology *flawed* because it would “require separate

¹⁸³ See *id.* ¶¶ 16-17.

¹⁸⁴ See *Phase I Order* at 2.

¹⁸⁵ See *Phase I Order* ¶ 13.

¹⁸⁶ *Phase I Order* ¶ 264.

¹⁸⁷ *Phase I Order* ¶ 83.

¹⁸⁸ *Id.* ¶ 46.

facilities to serve customers that are [in fact] in close proximity.”¹⁸⁹ Similarly, in determining what approach should be used to “design” the outside plant, the Commission found that the BCPM, unlike the HAI model, did not “adhere to sound engineering and forward-looking, cost-minimizing principles.”¹⁹⁰ Thus, the Commission found that BCPM did not use proper “optimization routines through use of sound network engineering design to use the most cost-effective forward-looking technology.”¹⁹¹

Qwest’s RLCAP model also contains fundamental TELRIC errors that inflate loop costs. As summarized in the Report of the Administrative Law Judge in the Minnesota Generic UNE Cost Proceeding: (1) RLCAP, “like all the U S WEST models, . . . heavily rely on embedded costs and structures and assumptions based on old data;” (2) RLCAP “does not actually model any distribution areas or compute costs based on information about the distribution areas in which actual customer locations are found, [and] neither provides nor uses any information about distribution area boundaries or distribution area living units;” (3) RLCAP “does not attempt to model either actual or forward-looking distribution lengths in the ‘scorched node’ context required for a TELRIC analysis;” (4) RLCAP uses “loop length data from several sources, [and] [o]f the various potential data sources mentioned, the documentation does not reveal which sources were actually used; (5) RLCAP makes a number of illegitimate assumptions about the density group constituents of each grouping of wire centers, by, for instance, using the same density group assumptions across all 14 of its states; (6) RLCAP “does not attempt to estimate costs for specific distribution areas,” whereas “HAI constructs clusters based on actual locations of customers in Minnesota and then develops distribution costs based on the location of the cluster and its distance from the wire center;” (7) RLCAP “makes no use

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶ 54.

¹⁹¹ *Id.* ¶ 61. The Commission in its *Platform Order* and subsequent *Inputs Order*, 14 FCC Rcd. 20156 (1999), also rejected many of the key inputs used in the BCPM. For example, the Commission found that BCPM overstated costs by assuming that “loop lengths that exceed 12,000 feet will be fiber cables.” *Platform Order* ¶¶ 68, 70. The Commission also has found the BCPM “assum[ption] that an efficient telephone company will benefit only marginally from sharing” is contrary to TELRIC principles. *Inputs Order* ¶¶ 242, 243. And the Commission rejected the cable cost per input

of geocoded data to locate customers; [n]or do RLCAP's distribution area designs rely on census data; rather, [t]he distribution designs were developed by several U S WEST engineers in 1988, [and] U S WEST has not provided any other support for these designs;" (8) whereas "[c]orrect estimates of costs should have the numerator (the total increment of costs required to provide the element of concern) consistent with the denominator (the demand for the element to be provided with those facilities)," U S WEST "does not have a proper match of the numerator and denominator;" (9) RLCAP's density group design approach "artificially limits the economies of scale potentially achievable in a scorched node environment," by failing to "permit the deployment of any equipment that is available provided that such equipment is least-cost and embodies forward-looking technology;" and (10) U S WEST does not make consistent structure sharing assumptions between states, because, for instance, in Minnesota, "RLCAP assumes that developers will pay 20% of the costs of placing buried cable facilities in distribution areas and that when developers do not pay such costs, it will incur 100% of such placement costs," whereas in Oregon, "U S WEST signed a Stipulation with OPUC Staff in which it agreed that it was reasonable to assume developers would pay 35% of the placement costs for buried cables."¹⁹²

Based on these and other identified weaknesses, the judge concluded "RLCAP does not qualify for serious consideration in this proceeding. It has not been shown to produce reliable, reasonable results. It cannot be used to calculate geographically deaveraged rates in a meaningful way. None of its major defects can be remedied easily."¹⁹³

The Arizona Corporation Commission adopted made a similar finding with respect to Qwest's LoopMod, the successor program to RLCAP: "Qwest's model is based primarily upon its embedded

values supported by BCPM's sponsors, which were based on cable costs reported by the incumbent LECs, in favor of the publicly available data provided and supported by AT&T and the HAI sponsors. *Id.* ¶¶ 103, 105.

¹⁹² *In the Matter of a Generic Investigation of U S West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements*, OAH Docket No. 12-2500-10956-2, MPUC Docket No. P-442, 5231, 3167, 466, 421/C1-96-1540, Report of the Administrative Law Judge, November 17, 1998, starting at ¶ 16; *see also* Mercer/Fassett Decl. ¶¶ 20.

¹⁹³ *Id.*

network and costs,” and it “fails to adequately incorporate efficiencies that should be recognized in a TELRIC environment.”¹⁹⁴

Rather than working with the parties to develop TELRIC-compliant cost studies, the WUTC changed some of the inputs in each of the cost studies, re-computed loop rates based on each of those adjusted cost studies, and averaged those costs to obtain what the WUTC termed a “cost floor[]” for loop rates.¹⁹⁵ The WUTC’s conclusion that its methodology created a TELRIC loop cost floor is nonsense. The WUTC conceded that the changes that it made to each cost study did not address the numerous TELRIC-errors in those cost studies.¹⁹⁶ Thus, to the extent that the clear TELRIC errors that were not addressed by the WUTC overstated loop Qwest’s Washington loop rates, the average of the cost models containing those errors results in loop rates that substantially exceed that which any reasonable application of TELRIC principles would have produced.

Even worse, the WUTC’s “averaging” process is completely unexplained, and further overstates Qwest’s Washington loop rates. After adjusting each of the cost studies to correct for some (but not all, as the WUTC conceded) of the clear TELRIC errors in those cost studies the WUTC determined that the Hatfield, BCPM, and RLCAP cost models produced per line monthly recurring loop costs of \$13.53, \$17.23, and \$13.76. Based on these results, the WUTC determined that the “cost of the unbundled loop [for Qwest in Washington] is \$17.00,”¹⁹⁷ which is almost the same cost produced by the BCPM. The WUTC’s “average” was more than \$2.00 higher than the simple average (\$14.84) produced by the three cost models that the WUTC itself determined produce non-TELRIC loop costs. To date, the WUTC has never explained how, based on the rates produced by the three adjusted cost studies, it calculated a \$17.00 loop rate. And no party has ever

¹⁹⁴ *In the Matter of the Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Arizona Corporation Commission Docket T-00000A-00-0194, Phase II Opinion and Order, June 12, 2002, p. 10 (emphasis added).

¹⁹⁵ See *Phase I Order* ¶ 265.

¹⁹⁶ See *Phase I Order* ¶ 269 (“we could not modify the models to comport to our findings . . . in those cases we simply note the likely [directional] impact on the loop cost”).

¹⁹⁷ *Phase I Order* ¶ 269.

demonstrated the ability to reproduce that loop rate.¹⁹⁸ The black-box characteristics of the loop rates adopted by the WUTC are, ironically, at odds with the reasoning provided by the WUTC for not adopting any one of the three cost studies supported by the parties – that “those cost models were not open, and did not provide[] all parties an opportunity to fully explore the advantages and the limitations of the difference cost models.”¹⁹⁹

Four months later, the WUTC further adjusted the BCPM to account for deferred taxes.²⁰⁰ That change reduced the loop costs produced by the BCPM from \$17.23 to \$15.72.²⁰¹ After making this change, the WUTC reported that the Hatfield, BCPM and RLCAP cost models produce loop cost estimates of \$13.53, \$15.72, and \$13.76, respectively. The WUTC then asserted, with no explanation, that the “evidence in the record” supports a finding that “the cost of the unbundled loop is \$16.25,”²⁰² which is substantially *higher* than the loop cost produced by any of the three cost models.

About one year later, the WUTC released its *Phase II Order*, wherein the WUTC adopted UNE loop rates, based on the costs approved in the *Phase I* proceeding and the 14th *Supp. Order*. In the *Phase II Order*, the WUTC produced a table summarizing its purported findings in the *Phase I Order*.²⁰³ The WUTC confirmed that the Hatfield, BCPM and RLCAP cost models produce loop cost estimates of \$13.53, \$15.72, and \$13.76, respectively.²⁰⁴ However, the table also included a line titled “Commission [WUTC] Adjustment per 8th ORDER [*Phase I Order*].”²⁰⁵ Those adjustments increased the cost estimates produced by the Hatfield, BCPM and RLCAP cost models by \$2.31,

¹⁹⁸ See Mercer/Fassett Decl. ¶ 25.

¹⁹⁹ *Phase I Order* ¶ 24.

²⁰⁰ See Fourteenth Supplemental Order, Prehearing Conference Order Resolving Technical Issues, *Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket Nos. UT-960369, -960370, -960371 (September 30, 1998) (“14th *Supp. Order*”).

²⁰¹ See *id.* ¶ 3.

²⁰² *Id.* ¶ 14.

²⁰³ *Phase II Order* ¶ 205.

²⁰⁴ See *id.*

²⁰⁵ *Id.*

\$0.75, and \$2.68, respectively.²⁰⁶ In fact, however, those adjustments were not adopted in the *Phase I Order* – indeed, the *Phase I Order* explicitly states that the WUTC made no such adjustment. Rather, those adjustments appeared *for the first time* in the *Phase II Order*. To this day, the WUTC has not explained how it computed those adjustments, when it computed those adjustments, or what exactly those adjustments represent.²⁰⁷

In reality, the loop cost adjustments listed in the WUTC's *Phase II Order* appear to be a *post hoc* justification for the \$16.25 loop cost adopted by the WUTC in the *14th Supp. Order*.²⁰⁸ Indeed, after adding those unexplained cost adjustments to the loop costs adopted by the Commission in the *14th Supp. Order* the cost estimates produced by the Hatfield, BCPM and RLCAP cost models are \$15.84, \$16.47, and \$16.44, respectively. And the average of these values is \$16.25. Thus, it appears that the WUTC's adjustments are nothing more than a post hoc attempt to justify its adoption of a \$16.25 loop cost for Qwest.²⁰⁹ On this record, there can be no finding that the WUTC applied TELRIC-compliant principles to develop Qwest's loop cost – indeed, it is impossible to determine what (if any) pricing principles the WUTC used to develop those costs.²¹⁰

In any event, the federal courts have expressly rejected state commission conclusions that crude averaging of rates from various non-TELRIC cost studies – whatever averaging process is used – produces TELRIC-based rates.²¹¹ The New Jersey BPU was faced with two competing cost models – AT&T's HAI model and Bell Atlantic's proprietary cost model.²¹² Although the New Jersey BPU found that Bell Atlantic's model did not follow TELRIC, like the WUTC, it questioned the way in

²⁰⁶ See *id.*

²⁰⁷ See Mercer/Fassett Decl. ¶ 27.

²⁰⁸ See *id.* ¶ 28.

²⁰⁹ See *id.*

²¹⁰ According to the WUTC, the \$16.25 loop cost adopted by the WUTC did not reflect common costs. Thus, to develop UNE loop rates the WUTC adopted a common cost additive for each of the three cost models. The WUTC then adopted rates based on the average of the costs (including the common cost additive) of the three cost studies. Based on this analysis, the WUTC ultimately adopted a loop rate for Qwest for \$18.16. See *id.* n. 6.

²¹¹ *AT&T Communications of New Jersey, Inc. v. Bell Atlantic-New Jersey*, Civ. No. 97-5762 (KSH), slip op. (D.N.J. June 6, 2000).

²¹² *Id.* at 28-29.

which the HAI model calculated outside plant.²¹³ And like the WUTC, having found all models “flawed,” the Board simply cast aside the controlling legal standards – and its own assessment of the parties’ proposed cost models – in favor of a crude “compromise” and took an average of the two cost models.²¹⁴

In reversing the New Jersey BPU’s order, the court expressly rejected the Board’s contention that the resulting rates were TELRIC compliant because, by averaging the two models, it balanced out the “flaw[s]” in the models.²¹⁵ Rather, the Court found that averaging the results of an embedded and forward-looking cost model resulted in “no real or tangible cost calculation at all.”²¹⁶ The Court also observed that the Board’s baby-splitting was logically flawed because the “averaging” was “applied evenly to all elements collectively” when, as here, the flaws in the various cost models affected rate elements differently.²¹⁷

On this record, there is no non-arbitrary basis on which this Commission could find that the loop costs adopted by the WUTC in the Phase I proceeding, or the discounted rates that are now in effect, are TELRIC-compliant.

Washington Switching Rates. The WUTC rejected all switching cost studies submitted in the Phase I proceeding.²¹⁸ Instead, the WUTC computed switching rates using its own largely unexplained, and clearly non-TELRIC, methodology.²¹⁹ The fact that the WUTC failed to apply TELRIC-principles to compute switching rates is plain from its own description of how those rates were developed. In particular, the switching rates adopted by the WUTC are based on pre-1997 switching investment with no forward-looking adjustments. And even that embedded cost data is not

²¹³ Decision and Order, Docket No. TX 951205631 (N.J. BPU Dec. 2, 1997).

²¹⁴ *AT&T Communications*, slip op. at 27-29.

²¹⁵ *Id.*

²¹⁶ *Id.* at 29.

²¹⁷ *Id.* at 28.

²¹⁸ *See Phase I Order* ¶ 347.

²¹⁹ *See Phase I Order* ¶¶ 320.

Qwest-specific. On the contrary, that data is based on *Verizon's* Washington Network, which is considerably smaller (and hence has higher per line costs) than Qwest's network.²²⁰

The WUTC began its switching cost analysis with 1994 data. In particular, the WUTC used 1994 data provided by GTE (now Verizon) and US WEST (now Qwest) purporting to identify “embedded [1994] investment” per line.²²¹ The WUTC did not even attempt to convert that embedded switch investments into a forward-looking switching investment. Instead, the WUTC simply converted the 1994 embedded investment value into 1997 dollars.²²² Simply put, the switching investment used by the WUTC to develop switching rates is the 1997 dollar value of Qwest's and Verizon's 1994 embedded switch investment.²²³

Based on this methodology, the WUTC determined that the 1994 embedded average switch investment per line, in 1997 dollars, was \$213.12. *See Phase I Order* ¶ 307, n. 37. That data was clearly erroneous. As the WUTC itself recognized, data provided by Qwest and Verizon showed that actual switch acquisitions made after 1994 averaged only \$109.35. *See id.* To account for this discrepancy, the WUTC purported to remove “outliers” from the data sets. The WUTC never identified its criteria for identifying “outliers,” nor did the WUTC identify which data entries it determined to be outliers. After applying its black-box methodology to remove “outliers” from the datasets, the WUTC determined that the 1994 embedded switching investment (in 1997 dollars) was \$205.03.²²⁴

As noted above, the \$205.03 is based on the 1994 switch investment submitted by Qwest and Verizon. The WUTC recognized that the number of lines serviced by Qwest was higher than that served by Verizon. To account for this difference, the WUTC lowered the embedded switching

²²⁰ Both Qwest and Verizon provide residential service to customers in Washington.

²²¹ *Phase I Order* ¶ 307.

²²² *See Phase I Order* ¶ 307.

²²³ *See Phase I Order* ¶ 307.

²²⁴ *See Phase I Order* ¶ 308.

investment for Qwest to \$186.37.²²⁵ Predictably, the WUTC did not explain (or provide any data showing) how it made this adjustment. The WUTC also made another adjustment to its embedded switching investment for Qwest to account for the fact that not all lines are revenue producing. To account for this fact, the WUTC arbitrarily increased its estimate of Qwest's embedded switching investment to \$201.28. Again, the WUTC did not explain how it determined the amount of the adjustment.

The WUTC did, however, recognize that its black-box calculations of Qwest's 1994 embedded network (in 1997 dollars) appeared to be inflated compared to the 1995 embedded costs for Verizon that Verizon had computed using this Commission's data. In particular, Verizon had submitted evidence in the Phase I proceeding that, according to Commission data, its 1995 embedded investment would be no higher than \$150.²²⁶

At this point, the WUTC threw up its hands and simply adopted, for Qwest, the 1995 embedded cost estimate for Verizon's network of \$150. *See Phase I Order* ¶ 312. Thus, the Qwest Washington switching rates adopted by the WUTC are (1) based not on Qwest-specific data, but on Verizon's Washington switching costs and (2) equal to 1995 embedded switching investment with *no forward-looking adjustments*.²²⁷ On this record, it is clear that the switching rates adopted by the WUTC do not remotely comply with TELRIC principles – indeed, those rates are neither forward-looking, nor based on Qwest's network.

Washington NRCs. As explained in the attached declaration of Thomas Weiss, Qwest's Washington NRCs – which are based on Qwest's non-recurring cost model – are inflated by numerous clear TELRIC errors.²²⁸ For example, Qwest's Washington hot cut NRC is \$162.81. That means that for every residential or business customer that a CLEC wins from Qwest, AT&T must now pay Qwest \$162.81 to have that customer's line physically transferred, in coordination with

²²⁵ *See Phase I Order* ¶ 309.

²²⁶ *See Phase I Order* ¶¶ 300 & 311.

²²⁷ *See Mercer/Chandler Decl.* ¶ 24

Qwest, to AT&T's facilities. Those charges are way out of line when compared to those of other ILECs that have obtained Section 271 approval. For example, Verizon charges hot cut rates of \$4.07, in Pennsylvania, and \$35 in New Jersey and New York.²²⁹ Qwest's Washington hot cut rates should be no more than \$ 2.08.²³⁰

Likewise, Qwest's Washington "basic loop installation" NRC of \$37.53 – which applies any time a CLEC seeks to serve a new customer that is not already served by the ILEC (new customers and customers that request additional lines) – is substantially overstated.²³¹ A truly TELRIC-compliant basic loop install NRC would not exceed \$10.00.²³²

2. Qwest's Utah Rates Are Substantially Inflated By Myriad Clear TELRIC Errors.

Qwest's Utah-approved rates, like its Washington-approved rates, reflect numerous clear TELRIC errors, and in Utah, as in Washington, there is no rational basis to conclude that the Qwest's arbitrary, unsupported discounts to those rates have removed the rate inflation caused by those TELRIC errors. But there is also an additional reason why Qwest's 11th hour rate reductions should not be considered with respect to Utah. Despite filing the "new" rates that it claims are TELRIC-compliant, Qwest continues to advocate substantially higher rates in the Utah PSC's ongoing UNE rate proceeding. Thus, it is clear that Qwest's gambit is to get its section 271 application approved on the basis of its current rates and then subsequently have those rates hiked back to competition foreclosing levels.

And there can be no doubt that the rates the PSC set (and which Qwest seeks to reinstate) for loops, switching and other important UNEs are well in excess of TELRIC. Qwest's loop and switching UNE rates were set by the Utah PSC in 1999 on the basis of 1998 cost data. *See Report and Order, Docket No. 94-999-01 (Utah PSC June 10, 1999) ("1999 Utah UNE Pricing Order")*.

²²⁸ *See* Weiss Decl. ¶ 39.

²²⁹ *See id.* ¶ 40.

²³⁰ *See id.*

²³¹ *See id.* ¶ 43.

²³² *See id.*

Given that the costs of providing UNEs have declined considerably in since this time, these stale UNE rates cannot be considered to be representative of the forward-looking, economic costs of providing UNEs today.

But even judged on the basis of 1998 costs, the rates set by the 1999 Utah UNE Pricing Order must be considered excessive. In setting loop and switching rates, the Utah PSC simply “split the baby,” taking the average of AT&T’s and US WEST’s proposed rates.²³³ Although this resulted in rates that were somewhat lower than advocated by US WEST, the resulting rates were still excessive.²³⁴

In particular, in its *1999 Utah UNE Pricing Order*, the Utah PSC found that US WEST’s cost model did not satisfy the Commission’s TELRIC methodology. As the Utah PSC correctly observed, the ICM “does not produce a forward-looking, economically efficient network” but instead “mimics the embedded costs of recent network experience.”²³⁵ Thus, the Utah PSC concluded that the ICM resulted in rates that were overstated.²³⁶

This conclusion was well-founded. The ICM uses LoopMod, the successor to RLCAP, to calculate loop investments.²³⁷ As noted above, LoopMod is defective for the same reasons that RLCAP is defective: it is based largely on embedded costs, and it fails to incorporate efficiencies that should be recognized in a TELRIC environment. Among other errors, (1) LoopMod still does not use geocoded customer location data, but instead relies on distribution areas obtained from Qwest’s Loop Engineering Information System (“LEIS”) databases, which presumably represents Qwest’s embedded/historical distribution areas; (2) LoopMod continues to use the five generic distribution designs that are the same throughout Qwest’s region, not specific to the state in question, and these generic designs do not consider actual customer location information specific to each distribution

²³³ See Mercer/Chandler Decl. ¶ 34.

²³⁴ See *id.*

²³⁵ *1999 Utah UNE Pricing Order* at 6-7.

²³⁶ *Id.* at 7.

²³⁷ See Mercer/Chandler Decl. ¶ 36.

area; (3) LoopMod places distribution facilities in the same manner as RLCAP 4.0 by dedicating two or three distribution pairs per location depending on the density group, a treatment found to be unreasonable by the ALJ in the Minnesota generic UNE rate case because it creates inconsistencies between the numerator (the total increment of costs required to provide the element of concern) and denominator (the demand for the element to be provided with those facilities) of the cost-per-line calculation; and (4) LoopMod maintains the same structure cost calculations that the Minnesota ALJ found “does not compute either actual or forward-looking structure costs.”²³⁸

On the other hand, the Utah PSC found that AT&T’s HAI model was appropriately “forward-looking.”²³⁹ Nonetheless, the Utah PSC decided it would not rely solely on the basis of the HAI model because of concerns regarding the way in which HAI’s used “proxy[s]” to determine the location of some customers.²⁴⁰ The Utah PUC, however, did not find that by using proxy locations that the HAI model understated costs; to the contrary, it specifically rejected that claim.²⁴¹

Thus, given the Utah PSC’s express recognition that the HAI model was forward-looking and did not understate the costs of outside plant – coupled with its finding that the ICM was an “embedded” cost model – the only appropriate course would have been for the Utah PSC to set rates using the HAI model. The Utah PSC, however, did not follow this straightforward approach. Instead, the Utah PSC arbitrarily set rates on the basis of the simple average of the costs calculated by the HAI model and US WEST’s embedded ICM model.²⁴² All this served to do was to reduce somewhat the bias from using US WEST’s ICM. As the Utah PSC recognized, the two models produce “significant[ly]” different “cost estimates.” For example, with respect to loops, HAI

²³⁸ See *In Re Commission Investigation Of Qwest’s Pricing Of Certain Unbundled Network Elements*, PUC Dockets No. P-442,421,3012/M-01-1916; *In the Matter of the Commission’s Review and Investigation of Qwest’s Unbundled Network Element (UNE) Prices*, PUC Docket No. P-421/CI-01-1375OAH Docket No. 12-2500-14490-, Rebuttal Testimony of Douglas Denney, p. 9; see also Mercer Chandler Decl. ¶ 36.

²³⁹ *Id.* at 7 (“The record shows that the HAI model employs a forward-looking, economically efficient approach.”).

²⁴⁰ *Id.*

²⁴¹ See *id.* at 7 (“we are not convinced by USWC testimony that the HAI model necessarily builds a deficient amount of outside plant.”).

²⁴² See *id.* at 7.

generated monthly costs of \$11.40 per loop while the ICM generated \$21.51 per loop.²⁴³ Thus, the resulting \$16.46 average of the results generated by the two models is over \$5.00 per month in excess of that generated by the HAI model, which, as noted, the Utah PSC itself recognized was appropriately forward-looking.

The Utah PSC also used this arbitrary “split the baby” approach for switching rates.²⁴⁴ This was clearly erroneous. Even if the HAI’s method for calculating customer locations understated the necessary amount of outside plant – a conclusion rejected by the Utah PSC – that would provide no grounds for using an average of the HAI and the ICM to set non-loop UNE rates. This is particularly true given the fact that the Commission has endorsed HAI’s switching cost module.²⁴⁵ Thus, there can be no doubt that by averaging the results of the HAI with the “embedded” ICM that the Utah PSC set switching rates in excess of TELRIC. As noted, the federal courts have expressly concluded that this type of crude averaging cannot result in TELRIC-based rates.²⁴⁶

The UNE rates set in the 1999 order also allow Qwest to double recover its costs. Most notably, the Utah PSC allowed Qwest to collect a separate, fixed vertical features charge.²⁴⁷ But in the HAI model “[v]ertical features are incorporated into the functionality provided in the local switching port, and thus are included in the port rate as derived from the HAI Model.”²⁴⁸ And as noted, the Utah PSC used the HAI (in part) to set switching rates, including the port rate, but never addressed, or even acknowledged, AT&T’s argument that HAI already includes the costs of vertical features in its port charge. Thus, by assessing a separate vertical features charge, the Utah PSC is requiring new entrants to pay twice for the costs of the switching equipment used to provide those

²⁴³ *Id.*

²⁴⁴ *Id.*; see also Mercer/Chandler Decl. ¶¶ 30-33.

²⁴⁵ See *Platform Order* 75-78 (finding that HAI “assume[s] the least cost, most-efficient and reasonable technology” use to provide switching and “generally satisf[ies] the requirement that each network function and element necessary to provide switching and interoffice transport is associated with a particular cost”).

²⁴⁶ *AT&T Communications of New Jersey, Inc. v. Bell Atlantic-New Jersey*, Civ. No. 97-5762 (KSH), slip op. (D.N.J. June 6, 2000).

²⁴⁷ *1999 Utah UNE Pricing Order* at 11.

²⁴⁸ Post-Hearing Br. of AT&T, Docket No. 94-999-01, at 22 (Utah PSC Feb. 17, 1999).

features. Given the size of this charge – \$3.71 per month for the most popular Feature Group 2 package – CLECs are placed at a significant cost disadvantage when competing with Qwest.²⁴⁹

Finally, Qwest’s Utah NRCs are inflated by numerous TELRIC errors that substantially overstate Qwest’s hot cut rates, basic installation rates, and other NRCs in Utah.²⁵⁰

3. Qwest’s Montana UNE Rates Are inflated By Numerous TELRIC Errors.

Qwest’s recurring and nonrecurring prices for UNEs and interconnection in Montana are the legacy of three sets of rate proceedings: the 1996-2000 arbitration litigation between Qwest’s predecessor, U S WEST, and AT&T; the 2000-01 UNE case between Qwest and five small intervenors; and the “benchmarked” rate adjustments that Qwest filed on the eve of its 271 application. None of the three sets of rate changes have produced TELRIC-compliant rates. Indeed, the PSC has disclaimed any finding of TELRIC compliance, acknowledging that the issue remains to be resolved in a future proceeding.

The issue of UNE prices under the 1996 Act first reached the Montana PSC in the 1996-98 arbitration between AT&T and U S WEST. AT&T initiated the proceeding by petitioning the PSC for arbitration on November 22, 1996. The PSC issued its decision in the arbitration four months later.²⁵¹

In its decision, the Montana PSC adopted loop prices based on the cost model submitted by AT&T, the Hatfield Model, with certain upward adjustments proposed by U S WEST. The result

²⁴⁹ In its 2002 Utah UNE Pricing Order, the Utah PSC set rates for several additional UNEs such as DS1 and DS3 loops and intra-building cables that were not addressed in the 1999 Utah UNE Pricing Order. See Order, Docket No. 00-049-105 (Utah PSC June 11, 2002) (“2002 Utah UNE Pricing Order”). Again, the rates approved by the Utah PSC suffer from a number of clear TELRIC violations. Most notably, at the hearings AT&T demonstrated that the cost models used by Qwest for these UNEs, and accepted by the Utah PSC, did not reflect efficient costs. In particular, AT&T showed that “Qwest generally overstates its prices [by] us[ing] models [that] depend on bids from relatively small contractors with short time horizons.” 2002 UNE Pricing Order at 8. In effect, Qwest “estimated the costs of a car by using the prices it would pay for the individual parts and labor to assemble those parts, rather than the price for the car as a whole.” Post Hearing Br. of AT&T and XO, Docket NO. 00-049-105, at 20 (filed Utah PSC Nov. 30, 2001). The Utah PSC agreed with this argument, but made no attempt to change Qwest’s costs to reflect the impact of this bias. Instead, the Utah PSC simply “encourag[ed]” the parties to develop “evidence in [the] future” to address this issue. 2002 Utah UNE Pricing Order at 8.

²⁵⁰ See Weiss Decl. ¶¶ 8-44.

²⁵¹ Docket No. D96.11.2000, *Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. § 252(b) for Arbitration of Rates, Terms and Conditions of Interconnection With U S WEST Communications, Inc.*, Order No. 5961b (March 20, 1997) (“Montana Arbitration Order”).

was a total statewide average loop price of \$27.41.²⁵² The PSC adopted AT&T's proposed prices for the NID, port, local switching, tandem switching, transport, signaling links, signaling transfer points, signal control points/databases, collocation, and local service provider change charge.²⁵³ For collocation, the PSC adopted the rates proposed by U S WEST.²⁵⁴

In setting these rates, the PSC made no finding that they complied with the 1996 Act or with the TELRIC standard. The Commission found that major discovery disputes between AT&T and Qwest remained unresolved too long into the proceeding to leave sufficient time for the development of an adequate record and decision. Failure to complete discovery sooner, the PSC stated, "not only made it difficult for the other party to frame its arguments and make its case, [and] made Commission decisions on permanent prices for services and network elements not merely impractical but a virtual impossibility."²⁵⁵ Further, the PSC added, "due to the complexity of the [UNE cost] studies and the short time in which to arbitrate, it is impossible to conduct a thorough review of each of the studies."²⁵⁶ Because of the "little time within which to complete the proceeding and render a final decision" on the "multitudinous issues and subissues" in the case, the "only practical method" of resolving that case was to "establish interim rates" only.²⁵⁷ The PSC promised to establish permanent rates "in a separate generic U S WEST costing and pricing docket where the parties can focus on costing and pricing issues and related policy matters."²⁵⁸

The PSC also declined in its March 1997 arbitration decision to prescribe rates in a geographically deaveraged form as required by 47 C.F.R. § 51.507(f). The PSC reasoned that the

²⁵² *Id.* at 87.

²⁵³ *Id.* at 86-87.

²⁵⁴ *Id.* at 87.

²⁵⁵ *Montana Arbitration Order* at 5 ¶ 10. In a subsequent order on reconsideration, the PSC made clear that the party injured by the unresponsiveness of its adversary in discovery was not U S WEST. "US WEST provided no showing of prejudice . . . Much of the information requested [by U S WEST] related to AT&T's costs, which have not been shown to be relevant in this matter." Docket No. D96-11.20, Order No. 5961c, Order on Petitions for Reconsideration (July 9, 1997), at 3-4.

²⁵⁶ *Id.* at 81.

²⁵⁷ *Id.* at 7, ¶ 15.

²⁵⁸ *Id.* at 81-82; *accord, id.* at 7-8 ¶ 16.

“FCC’s geographic deaveraging requirements have been stayed by the 8th Circuit and we need not follow them.”²⁵⁹

Nearly four more years passed before the PSC even attempted to cure this deficiency by issuing geographically deaveraged rates.²⁶⁰ The “deaveraged” rates adopted by the PSC, however, were not deaveraged in the sense of reflecting the density-based cost differences of urban, suburban and rural wire centers. Instead, the PSC adopted a Qwest “deaveraging” scheme designed to protect Qwest’s existing *retail* rate structure from competitive arbitrage. This rate structure divided rates into four concentric rate zones around each central office. The rate structure ignored all cost differences *between* wire centers.²⁶¹ The PSC acknowledged that its action was driven primarily by a concern for “retail price stability,” not cost recognition.²⁶² “There is reason to believe that Qwest’s rate/revenue deaveraging proposal, although arguably related to costs, is arbitrary.”²⁶³

While the deaveraging case was still pending, Qwest moved to increase the underlying rates. In June 2000, Qwest applied to the PSC for permission to implement changes—most of them large increases—in virtually all of its recurring and nonrecurring rates for UNEs and interconnection. Qwest based its cost studies on essentially the same cost models, including the ICM, discussed above. The PSC responded by instituting an investigation of the proposed rate changes in July 2000.²⁶⁴

Perhaps because of the small number of local lines in the portion of Montana served by Qwest, the perceived high cost of rate litigation against Qwest, and the meager results of four years of UNE rate litigation between Qwest and AT&T, only six parties chose to intervene in the new case: Association of Communications Enterprises (“ASCENT”), Avista Communications of Montana, Inc.,

²⁵⁹ *Id.* at 83.

²⁶⁰ Docket No. D99.12.2777, *Implementation of 47 C.F.R. § 51.507(f), Establishing Different Rates for Network Elements in Different Geographic Areas Within The State*, Order No. 6227b (Dec. 18, 2000).

²⁶¹ *Id.* at 6-8, 20.

²⁶² *Id.* at 20.

²⁶³ *Id.*

²⁶⁴ Docket No. D2000.6.89, *Filing by Qwest Corporation, f/k/a U S WEST Communications, Inc. to Determine Wholesale Discounts, Prices For Unbundled Network Elements, Collocation, Line Sharing, and Related Matters*.

McLeodUSA Wireless, Inc., Montana Consumer Counsel, New Edge Networks, and Touch America, Inc.²⁶⁵

On June 6, 2001—six days before the scheduled beginning of trial—the three intervenors still remaining in the case (Avista, Montana Wireless, Touch America, and the Montana Consumer Counsel) threw in the towel. They agreed to a Qwest “compromise” proposal that increased the “interim” statewide average loop rate of \$27.41, already one among the highest in the United States, to \$28.37. They agreed to make permanent the non-density based method of geographic “deaveraging” that Qwest had devised to protect its existing retail rate structure from competition. And they agreed to rates for switching and other UNEs based on Qwest’s cost studies.²⁶⁶

There was no pretense that the stipulated rates represented any principled effort to comply with the TELRIC standard. To the contrary, the stipulation contained the express disclaimer that “[n]o party’s position in this docket is accepted by the other parties by virtue of their entry into this Stipulation, nor does it indicate their acceptance, agreement or concession to any rate-making principle, cost of service determination, or pricing principle embodied, or arguably embodied, in this Stipulation.”²⁶⁷

The Wyoming PSC, while ratifying the stipulation, made no findings that the stipulated rates were TELRIC compliant. The PSC expressly reserved the right to argue, in its recommendation to the FCC after Qwest’s anticipated 271 filing, that “elements of the Stipulation should be changed before the FCC approves Qwest’s 271 petition for interLATA market entry in the State of Montana.”²⁶⁸

Even Qwest evidently recognized that its Montana rates would not pass muster at this Commission. On July 3, 2002—just before filing its Section 271 Application—Qwest unilaterally

²⁶⁵ Montana PSC Docket No. 2000.6.89, Notice of Staff Action (served July 28, 2000).

²⁶⁶ See Docket No. D2000.6.89, Stipulation filed June 6, 2001; *id.*, Final Order on Stipulation (served Oct. 12, 2001).

²⁶⁷ Stipulation ¶ 3.

²⁶⁸ Docket No. D2000.6.89, Final Order on Stipulation ¶ 9.

lowered those rates to “expedite consideration of Qwest’s Section 271 application.”²⁶⁹ Qwest claims that these eleventh hour rate reductions produce TELRIC-compliant rates because: (1) the new rates are lower than the rates adopted by the Montana PSC and (2) the new rates pass the Commission’s benchmarking analysis, using Colorado as the benchmark state.

AT&T explains elsewhere why Qwest’s benchmarking analysis is unsound. Here, it is sufficient to note that the Montana PSC, in allowing the new rates to take effect, expressly disclaimed any finding they were TELRIC-compliant. “The Commission has not undertaken the review contemplated by 47 U.S.C. § 252(f)(3)(B) and consequently retains authority to continue review of the SGAT under 47 U.S.C. § 252(f)(4).”²⁷⁰

4. Qwest’s Wyoming UNE Rates Are Inflated By Numerous TELRIC Errors.

The US WEST-AT&T Arbitration (1996-97). On November 22, 1996, AT&T filed a petition for arbitration with the Wyoming PSC under the 1996 Act. After multiple rounds of testimony and a week of hearings, the PSC issued a 101-page order on the merits on April 23, 1997.²⁷¹ In its order, the PSC found that “the cost information which we now have before us would [not] support the accurate determination of prices for unbundled network elements which would be consistent with 47 CFR §§ 51.505 and 51.511.”²⁷² “Neither party has demonstrated to our satisfaction that its model fully and accurately addresses TELRIC or TSLRIC costing.”²⁷³ “U S WEST’s cost study . . . utilized cost information that US WEST has allegedly submitted in Phase II [of a separate proceeding to set *retail* prices under state law], but on which the Commission has neither examined in appropriate hearings nor relied upon in any meaningful way.”²⁷⁴ And AT&T’s cost study, “while arguably

²⁶⁹ See Thompson Montana Pricing Decl. ¶ 13.

²⁷⁰ Docket No. D2000.6.80, *Review of Qwest Communications’ Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Order No. 6425 (served July 12, 2001).

²⁷¹ Wyoming PSC Docket No. 70000-TF-96-319, *In the matter of the arbitration by the Public Service Commission of an interconnection agreement between U S WEST Communications, Inc., and AT&T Communications of the Mountain States, Inc., under 47 U.S.C. § 252* (order issued Apr. 23, 1997) (“1997 Arbitration Order”).

²⁷² *Id.* at 21.

²⁷³ *Id.* at 22.

²⁷⁴ *Id.* at 44.

consistent with the federal guidelines, did not sufficiently recognize Wyoming's particular requirement of TSLRIC based pricing [for retail services].”²⁷⁵

The PSC ordered both AT&T and U S WEST to rerun their cost models with a PSC-specified cost of capital, PSC-approved current depreciation lives, and an input for income tax expense that reflect the absence of any state income tax in Wyoming. The PSC also ordered U S WEST to recover an allowance for supposedly unrecovered depreciation that US WEST had included in its cost study.²⁷⁶ The average of the revised values submitted by the parties, the PSC announced, would serve as interim rates.²⁷⁷

The July 1997 PSC Decision In The U S WEST Retail Rate Case. Before taking further action in the arbitration, the PSC issued a decision in a closely related case involving U S WEST's retail prices.²⁷⁸ The two cases were linked by the Wyoming Telecommunications Act of 1995, which directed the PSC to reform US WEST's retail rate structure, with the ultimate requirement that all retail services would cover the TSLRIC of those services. Because the 1995 state statute required the adoption of cost-based rates, the retail price litigation raised many of the same issues that the PSC needed to resolve in the AT&T/U S WEST arbitration.²⁷⁹

With respect to threshold choice of cost models, the PSC found neither parties' models fully acceptable. The PSC found that the loop cost model relied on by AT&T, an early version of the Hatfield Model, lacked sufficient granularity of data, had too many density zones (nine), and tended to load too many costs on the two lowest density zones. The Hatfield Model, however, was a “relatively open unitary model.”²⁸⁰

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 21.

²⁷⁷ *Id.* at 21 and 45.

²⁷⁸ Wyoming PSC Docket No. 70000-TR-96-323, *In the Matter of the Application of US West Communications, Inc. for Authority to Implement Phase II of its Proposed Wyoming Price Regulation Plan for Essential and Noncompetitive Telecommunications Services* (decision served July 21, 1997) (“Phase II Retail Decision”).

²⁷⁹ See Phase II Retail Decision ¶¶ 68-80.

²⁸⁰ *Id.* ¶ 94.

The PSC’s discussion of U S WEST’s loop cost model, the RLCAP, was scathing: the RLCAP was a virtually unverifiable black box. Moreover, its inputs and assumptions—to the extent that they could be discerned—appeared to be designed to replicate the costs of U S WEST’s embedded network, not the costs of an efficient forward-looking network.

RLCAP’s cost estimates depend upon “factor databases” that are under the control of U S WEST and which do not allow for either the performance of independent cost estimates or the performance of independent sensitivity analyses of U S WEST’s loop cost estimates.

RLCAP is largely a “closed” model. It is not possible to completely replicate its results because many inputs and resulting outputs are considered proprietary by U S WEST. Additionally, portions of this model (certain modules) are not available to outside parties.

We note that it uses five density zones for some calculations but that U S WEST uses a base rate area and three zones for actual pricing purposes in Wyoming—another discontinuity . . .

We have not been able to see sufficiently into RLCAP and its associated models to ascertain how they deal with data or even what their components really are. It has been shown to be a slow and relatively cumbersome group of models which appear to have developed as in-house costing tools. They resist both examination and understanding, and therefore, do not appear to be able to be tested for compliance with the various legal standards which we must apply in this case (e.g., a reasonable and nondiscriminatory pricing result in the public interest) . . .²⁸¹

Accordingly, the PSC directed the parties to submit additional runs of the competing models using inputs designated by the PSC, with the further constraint that the Hatfield Model should be run to produce outputs in only three density zones.²⁸²

The PSC’s choice of inputs for the compliance runs was a mixed bag. The PSC held that 65% of outside plant structure placement should be assumed to “difficult” (i.e., above-average cost), a reversal of U S WEST’s position in earlier litigation and other states, because US WEST’s *embedded* cost data assertedly supported such a result.²⁸³ Despite finding that “structure sharing will increase as telecommunications markets are opened up to competition and companies are forced to capitalize on

²⁸¹ *Id.* ¶¶ 84, 87-88, 93.

²⁸² *Id.* ¶ 100.

²⁸³ *Id.* ¶ 108.

cost saving opportunities in order to be competitive in this new business environment,” the PSC assumed that only 25 percent of the cost of placing outside plant would be borne by other utilities.²⁸⁴

With respect to common overhead costs, the PSC rejected the 10.4 percent overhead cost factor proposed by AT&T on the theory that it “reflects too closely the level of cost that might be experienced in a truly competitive business environment” – *i.e.*, was too TELRIC compliant.²⁸⁵ Instead, the PSC split the baby by adopting a value of 15 percent—the average of the 10.4 percent factor proposed by AT&T and the lower end of the 20-25 percent range proposed by Qwest.²⁸⁶ And the PSC explicitly split the baby in adopting a drop length of 90 feet, the “average of US WEST’s stated [embedded] system average and AT&T’s long urban drop length.”²⁸⁷

On the other hand, the PSC rejected U S WEST’s proposed cost of capital of 10.87 percent in favor of a value of 10.05 percent.²⁸⁸ The PSC rejected U S WEST’s proposal to adopt depreciation lives shorter than those previously prescribed by the PSC.²⁸⁹ The PSC adopted an “objective” distribution fill factor of 75 percent.²⁹⁰ And the PSC declined to approve the increases in nonrecurring charges proposed by Qwest.²⁹¹

Wyoming law, however, has a peculiar feature: U S West has the right to reject PSC rate decisions that establish rates differing significantly from those proposed by the carrier. Wyoming Stat. § 37-15-203(b). U S West exercised this authority by rejecting the PSC’s rate case decision in its entirety.²⁹²

²⁸⁴ *Id.* ¶¶ 127-132.

²⁸⁵ *Id.* ¶ 135.

²⁸⁶ *Id.* ¶ 136.

²⁸⁷ *Id.* ¶ 145.

²⁸⁸ *Id.* ¶ 122-126.

²⁸⁹ *Id.* ¶ 156-71.

²⁹⁰ *Id.* ¶¶ 137-142.

²⁹¹ *Id.* ¶¶ 172-78.

²⁹² *See, e.g.*, “Price Plan, p. 2, wherein U S WEST confirms that “[t]he Commission entered its order on July 21, 1997 modifying the 1996 Plan.” U S WEST subsequently rejected the Commission’s order pursuant to W.S. § 37-15-203(b). *In the Matter of the Application of U S WEST Communications, Inc. for Authority to Implement Price Ceiling in Conjunction with Its Proposed Wyoming Price Regulation Plan for Essential and Noncompetitive Telecommunications Services*, Docket No. 70000-TR-98-420.

The PSC's Reversal of Course In The Arbitration Case (1997-1999). The derailment of the PSC's retail rate proceeding brought the pending UNE arbitration to a halt as well. After April 1997, the PSC issued no further decision on the merits of the unresolved cost and pricing issues for nearly two years. Instead, the PSC temporized, requesting additional rounds of evidence and holding additional hearings. The problem, the PSC announced in a letter-order to AT&T and U S WEST, was that the Commission had "determined that there should be basic 'symmetry' between the relevant wholesale prices set in arbitration and retail prices set in the U S WEST price plan case" (*i.e.*, the then-pending retail price case).²⁹³

The PSC eventually issued a further decision on the merits on March 22, 1999.²⁹⁴ In that decision, the PSC's retreat became a rout.

First, the PSC declined to adopt geographically deaveraged rates in the sense contemplated by 47 C.F.R. § 51.507(f)—*i.e.*, deaveraging to reflect the density-based cost differences of urban, suburban and rural wire centers. Instead, the PSC adopted Qwest's rate structure, which divided rates into four concentric rate zones around each central office. The latter rate structure, by the PSC's own admission, was designed to protect Qwest's existing *retail* rate structure from competitive arbitrage, while ignoring most cost differences *between* wire centers.²⁹⁵

The PSC's adoption of Qwest's rate structure in turn determined the PSC's choice of cost models. "We must adopt US WEST's RLCAP model," the PSC held, because it accommodates "internal U S WEST data" and because it generates outputs in a format that translates directly into U S WEST's deaveraging scheme.²⁹⁶ The PSC made no mention of its previous findings that the RLCAP was an unverifiable black box, and offered no response to the evidence offered by AT&T

²⁹³ Wyoming PSC Docket No. 70000-TF-96-319 and 72000-TF-96-95, Letter Order dated Aug. 5, 1998 at ¶ 3.

²⁹⁴ Wyoming PSC Docket No. 72000-TF-96-95 and 70000-TF-96-319, *In the Matter of the Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc. and U S West Communications, Inc. Pursuant to 47 U.S.C. Section 252*, Order on Rehearing (issued March 22, 1999).

²⁹⁵ *Id.* ¶¶ 128, 131, 136, 157.

²⁹⁶ *Id.* ¶ 157.

during the 1997-99 proceedings that improvements to the Hatfield Model had eliminated the PSC's prior concerns over its granularity and accuracy.²⁹⁷

AT&T petitioned for rehearing of the March 1999 decision on April 21, 1999.²⁹⁸ In its petition, AT&T noted that the PSC had never responded to the AT&T cost testimony showing that the RLCAP replicated the costs Qwest's embedded network, not the costs of a forward-looking network.²⁹⁹ AT&T also reminded the PSC that it had never disavowed its June 1997 findings in the retail rate case concerning the unverifiability of the RLCAP inputs, and the apparent inconsistency between the model assumptions and the forward-looking assumptions of the TELRIC and TSLRIC standard.³⁰⁰

AT&T also sought rehearing of the PSC's approval of Qwest's "deaveraging" scheme. AT&T reiterated that Qwest's concentric rate structure ignored the density-based cost differences among wire centers, adding that even the Qwest witness who sponsored the rate design "testified that he had no idea how the structure of the zones was determined."³⁰¹

The PSC responded with a further decision on June 30, 1999.³⁰² Acknowledging "the great reliance" of the Qwest cost models on "actual" costs, "U S WEST-specific data," "state-specific factors" and "'real world' checks"—*i.e.*, embedded assumptions—the PSC nonetheless insisted that the models "use forward-looking technology."³⁰³

The Generic Rate Proceeding (2001). On July 31, 2001, Qwest initiated a generic rate proceeding to permanent establish UNE prices for all CLECs in Wyoming.³⁰⁴ In the aftermath of the

²⁹⁷ *Cf. id.* ¶ 136.

²⁹⁸ Wyoming PSC Docket Nos. 70000-TF-96-319 and 72000-TF-96-95, AT&T Petition for Rehearing of Commission's March 22, 1999 Order.

²⁹⁹ *Id.* at 7 (citing record).

³⁰⁰ *Id.* at 7-8 (citing July 1997 PSC decision).

³⁰¹ *Id.* at 11 (citing record).

³⁰² Docket Nos. 70000-TF-96-319 and 72000-TF-96-95, Order on Petitions for Rehearing of U S WEST Communications, Inc. and AT&T Communications of the Mountain States, Inc., and Amending Previous Orders (issued June 30, 1999).

³⁰³ *Id.* ¶ 15.

³⁰⁴ Wyoming PSC Docket No. 700000-TA-01-700, *In the Matter of Qwest Corporation's Request to Open an Unbundled Network Elements TELRIC Cost Docket*.

costly and unproductive arbitration proceeding, only two CLECs intervened (AT&T and Contact Communications); AT&T subsequently withdrew without filing testimony. On June 19, 2002, Qwest settled the case by stipulation with Contact and the Consumer Advocate Staff of the PSC.³⁰⁵

Qwest's Eleventh-hour "benchmarked" rate reductions. Even Qwest evidently recognized that its Wyoming rates would not pass muster at this Commission. On July 1, 2002—just before filing its Section 271 Application—Qwest unilaterally reduced certain of its rates for local switching usage, local switch ports, shared transport, and tandem switching. *See* Thompson Wyoming Pricing Decl. ¶ 12. Qwest claims that these eleventh hour rate reductions produce TELRIC-compliant rates because: (1) the new rates are lower than the rates adopted by the Wyoming PSC and (2) the new rates pass the Commission's benchmarking analysis, using Colorado as the benchmark state. As explained above, Qwest's benchmarking analysis is unsound. Here, it is sufficient to note that the Wyoming PSC, while allowing the new rates to take effect, did so without conducting any adversarial proceeding, or making any findings, concerning their compliance with TELRIC.³⁰⁶

C. Qwest's Has Failed To Satisfy Its Burden Of Proving That Its Colorado UNE Rates Are TELRIC-Compliant.

Qwest's Colorado UNE rates – which also are the foundation of its benchmarking analysis for the other four applicant states – result from two separate Colorado proceedings. The Colorado PUC initially set permanent Colorado interconnection and UNE rates in a July 28, 1997 order, Docket No. 96S-331T ("331T Order"). Almost one and a half years later, on November 30, 1999, Qwest (then U S WEST Communications, Inc.) filed an SGAT. Qwest's SGAT contained the rates set in the 1997 331T Order, and numerous new rates that had never been reviewed by the Colorado PUC. In response, the Colorado PUC opened Docket No. 99A-577T ("577T Proceeding"). After numerous CLECs, as well as the Colorado Office of the Consumer Counsel ("Colorado OCC") and the

³⁰⁵ Wyoming PSC Docket No. 700000-TA-01-700, Stipulation and Agreement (June 19, 2002); Wyoming PSC Docket No. 70000-TA-00-599, *In the Matter of the Application of Quest Corp. Regarding Relief under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, And Approval of Its Statement of Generally Available Terms*, Order on SGAT Compliance (July 9, 2002) at 2.

³⁰⁶ *See* Wyoming PSC Docket No. 70000-TA-00-599, *supra*, Order on SGAT Compliance (July 9, 2002).

Colorado PUC's own staff ("CPUC Staff") opposed the SGAT, the Colorado PUC released a Procedural Order, on December 29, 2000, in the 577T Proceeding, to review the rates in the 331T Order.

On January 16, 2001, Qwest filed cost studies purporting to support the 331T rates, and the numerous new rates contained in the SGAT. Qwest supplemented that testimony on April 23, 2001. Then, in late July, only two weeks before the scheduled August hearings, Qwest filed a new loop cost study and a new switching cost study, and urged the Commission to adopt loop rates based on those new cost studies or, in the alternative, to incorporate the inputs from those cost studies into the HAI 5.2 cost model ("HAI Model") proposed by the CLECs. The CLECs opposed Qwest's eleventh hour filings of entirely new cost studies and inputs, noting that they could not possibly conduct sufficient discovery to fully analyze and assess Qwest's new proposal. The CLECs also sought to, at least, file rebuttal testimony showing that the new inputs proposed by Qwest were not TELRIC-compliant, and should not be incorporated into the HAI Model. The Colorado PUC denied both CLEC requests. The Colorado PUC held hearings from August 6 through August 17, 2001, and the parties filed closing Statements of Position on September 12, 2001. On December 21, 2001, the Colorado PUC issued the *Colorado Pricing Order*.³⁰⁷ As explained below, the UNE rates set in that order are fundamentally flawed.

1. Qwest's Colorado NRCs Are Overstated By Clear TELRIC Errors.

The Commission has long recognized that cost-based nonrecurring charges ("NRCs") are critical to making competitive local telephone entry economically feasible.³⁰⁸ Regardless of the level of the recurring rate, an ILEC will foreclose meaningful competition if it is allowed to increase potential competitors' costs significantly through inflated non-recurring charges. New entrant

³⁰⁷ Before the Public Utilities Commission of the State of Colorado, Commission Order, Docket No. 99A-577T (Mailed December 21, 2001) ("Colorado Pricing Order").

³⁰⁸ See, e.g., *AT&T Communications*, 103 FCC 2d 277, ¶ 37 (1985) ("It is evident that nonrecurring charges can be used as an anticompetitive weapon to . . . discourage competitors"); Second Memorandum Opinion and Order on Reconsideration, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd. 7341, ¶ 43 (1993) ("absent even-handed treatment, nonrecurring reconfiguration charges could constitute a serious barrier to competitive entry").

competitive carriers must pay NRCs up-front, and if NRCs are significantly overstated, then potential new entrants will not be able to afford to enter the market. Moreover, higher NRCs increase the level of market risk faced by potential new competitive local exchange market entrants because the high price of entry substantially reduces the potential competitors' pricing flexibility relative to the pricing flexibility enjoyed by the incumbent, which does not have to pay the NRCs.

As explained in the attached declaration of Thomas Weiss, Qwest's Colorado NRCs – which are based on Qwest's "ENRC" cost model – are inflated by numerous clear TELRIC errors. As one example, Qwest's hot cut rates are vastly inflated above cost-based levels. Qwest's Colorado SGAT reflects two separate hot cut charges. One is described as a "coordinated cut-over" and costs about \$60. The other is described as a "coordinated cut-over with testing" and costs about \$170. As demonstrated by AT&T, correcting the clear TELRIC errors in Qwest's cost study shows that neither hot cut rate should exceed about \$13.³⁰⁹ And based on AT&T's fully TELRIC-compliant Colorado non-recurring cost study, Qwest's hot cut rate should not exceed \$2.08.³¹⁰

Likewise, Qwest's "basic loop installation" NRC of \$55.27 – which applies anytime a CLEC seeks to serve a new customer that is not already served by the ILEC (new customers and customers that request additional lines) – is substantially overstated.³¹¹ A truly TELRIC-compliant basic loop install NRC in Colorado is approximately \$0.29.³¹² And even Qwest's own cost NRC cost study produces a basic loop install rate of only about \$8.00 after correcting for many of the TELRIC violations in that cost study.³¹³

One fundamental error that substantially inflates Qwest's basic loop install NRC is that it assumes that Qwest will perform a *full* disconnect for every installation. As in the Qwest I declaration of Thomas Weiss, the fact that Qwest recovers the cost of a disconnect at the time of

³⁰⁹ See *Weiss Qwest I Decl.* ¶ 43 (attached hereto in Attachment 7).

³¹⁰ See *id.*

³¹¹ See *id.*

³¹² See *id.*

³¹³ See *id.*

installation is a clear TELRIC-error. In effect, Qwest charges CLECs (at an inflated rate) for losing customers even before the CLEC begins serving new customers. Even worse, the install and disconnect rates reflected in Qwest's loop install NRC are both overstated. Qwest has explained that it often does not fully disconnect a line when service is terminated; rather Qwest leaves the line connected to its network using a method called a "soft dial tone" (which is equivalent to a "warm dial tone").³¹⁴ This type of disconnect requires far fewer activities – and hence costs – than a full disconnect. Yet Qwest's basic loop install NRC (which reflects disconnect costs) shows no adjustment to account for those costs.³¹⁵ In addition, installation of a "warm dial tone" line would be less expensive than a completely disconnected line, yet Qwest's basic loop installation does not reflect a reduction to account for the fact that many of Qwest's lines are "warm dial tone" lines.³¹⁶

The reason that Qwest's NRCs are so overstated is that they were developed using Qwest's ENRC cost model, which contains numerous clear TELRIC errors. These errors include: (1) the improper recovery of disconnect costs at the time when a loop is initially provisioned; (2) recovery of costs for manual work activities that would be performed electronically in a forward-looking network; (3) recovery of costs for activities that are unnecessary in a forward-looking network; (4) recovery of nonrecurring costs that should be recovered through recurring rates; and (5) reliance on improperly computed time estimates for various work activities.³¹⁷ Each of these clear TELRIC errors is described in detail in Mr. Weiss' attached declaration.

2. Qwest's Colorado UNE Loops Rates Are Overstated By Clear TELRIC Errors.

The Colorado PUC correctly recognized that the cost model advanced by AT&T – the HAI Model – is capable of producing TELRIC-compliant UNE loop rates. Accordingly, the Colorado PUC stated that it would "look primarily to the HAI Model" to set Qwest's Colorado UNE loop

³¹⁴ See *Qwest July 22 Ex Parte Letter* at 12.

³¹⁵ See Weiss Qwest I Reply Decl. ¶¶ 3-10.

³¹⁶ See *id.*

³¹⁷ See Qwest I Weiss Decl. ¶¶ 10-36.

rates.³¹⁸ However, the Colorado Commission then adopted non-TELRIC inputs to use in the HAI Model. As explained in the attached declaration of Robert Mercer and Dean Fassett (“Mercer/Fassett Decl.”), a cost model is only as good as the input assumptions used. An appropriately designed forward-looking cost model will not produce forward-looking cost estimates if it is not populated with forward-looking inputs.³¹⁹ And many of the key input values approved by the Colorado PUC, often with little or no explanation, were based upon Qwest proposals that violate fundamental TELRIC principles. As the Colorado Staff explained, “[t]he Qwest approach ignores the most fundamental TELRIC Principle: Existing costs should not be included in wholesale price calculations. Qwest includes these costs, in toto, then uses anti-competitive adjustments as a means of transforming historical costs into future costs.”³²⁰ Because the Colorado PUC failed to adopt TELRIC-compliant inputs, Qwest’s rates are vastly overstated.

As one example, the Colorado PUC adopted an input for “plant mix” that substantially inflates Qwest’s UNE-loop rates. Feeder and distribution facilities may be placed on aerial structures (*e.g.*, supported on telephone poles), underground (placed in conduit that is trenched underground), or buried in trenches (trenched directly into the ground). As a general matter, aerial cable placement is the least expensive – and thus would be used by an efficient competitor wherever possible – followed by buried cable. The most expensive cable placement method is underground cable.³²¹

The record in the Colorado UNE pricing proceeding shows that an efficient network owner would deploy about 30 percent aerial cable (and likely more).³²² The Colorado PUC, however, adopted a split-the-baby approach. In particular, the Colorado Commission adopted an input of 20% for the proportion of Qwest’s Colorado network that represents aerial cable, which is a rough average of the forward-looking distribution of aerial plant supported by the CLECs (about 30%) and the

³¹⁸ See *Colorado Pricing Order* at 38.

³¹⁹ See Mercer/Fassett Qwest I Decl. ¶ 13 (attached hereto in Attachment 7)

³²⁰ See CPUC Staff RRR at 4.

³²¹ See Mercer/Fassett Qwest I Decl. ¶ 27.

³²² See Mercer/Fassett Qwest I Decl. ¶ 28.

portion of aerial cable that exists in Qwest's existing network (about 12%).³²³ This clear TELRIC error overstates loop costs by at least \$0.80.

To make matters worse, when the Colorado PUC improperly reduced the percentage of aerial plant used in the HAI Model from about 30% to 20%, it allowed Qwest to split the 10% of cable that remained unallocated after this adjustment equally between buried plant and the most expensive structure, underground plant.³²⁴ Even if there was some basis for reducing aerial plant below 30 percent, there is no possible basis for substituting a substantial amount of underground plant; rather, any such substitution would be to the next cheapest solution, buried plant.³²⁵ Thus, at the same time that the Colorado PUC arbitrarily lowered the percentage of aerial cable plant, it arbitrarily increased the percentage of expensive underground cable plant. This clear TELRIC error inflates Qwest's UNE loop rates by an additional \$0.48.

There are numerous other non-TELRIC inputs that substantially inflate Qwest's non-loop UNE rates including: (1) failure to adopt appropriate route distances for distribution cable; (2) massively inflated estimates for the amount of cable required for "drops"; (3) overstated network expense factors; and (4) adoption of substantially overstated rates for plow (in order to bury cable). The combined effect of all of these TELRIC-errors is that Qwest's Colorado UNE loop rates are overstated by at least \$2.00 above TELRIC levels.³²⁶

3. Qwest's Colorado Switching Rates Are Overstated By Clear TELRIC Errors.

In the *Colorado Pricing Order*, the Colorado Commission recognized that the rates in the *331T Order* were stale, and did not reflect "the changes in technology, the regulatory field, or the merger of U S WEST with Qwest."³²⁷ However, the Colorado PUC ignored the substantial evidence submitted by AT&T and other CLECs identifying TELRIC-compliant switching rates, and said only

³²³ See Mercer/Fassett Qwest I Decl. ¶ 28.

³²⁴ See *Colorado Reconsideration Pricing Order* at 32.

³²⁵ See Mercer/Fassett Qwest I Decl. ¶ 34-35.

³²⁶ See *id.* The clear TELRIC errors that inflate Qwest's loop rates also preclude competitive entry by substantially distorting the deaveraging process in Colorado. See Mercer/Fassett Qwest I Reply Decl. ¶ 5.

that “[t]he record of the 99A-577T does not support a determination by the Commission of final local switching rates.”³²⁸ Based on these “findings,” the Colorado PUC left the inflated rates set in the 1997 331T *Proceeding* in place on an “interim” basis.

Recognizing that the 331T rates were overstated and would not pass muster in a federal section 271 proceeding, Qwest “voluntarily” reduced those rates. Qwest computed those new rates using the same HAI Model submitted by AT&T and other CLECs in the 577T Proceeding that the Colorado PUC found to be “insufficient,” but with different input values. Because Qwest changed the HAI Model’s inputs, the new rates proposed by Qwest – although lower than the 331T rates – were substantially higher than those proposed by AT&T and other parties in the 577T Proceeding. The Colorado PUC made no attempt to determine whether this new evidence was sufficient. Instead, the Colorado PUC adopted Qwest’s proposed switching rates on the sole ground that they were lower than the stale 331T switching rates that the Colorado PUC had adopted in the *Colorado Pricing Order*, and that lower rates “benefit CLECs.”³²⁹

Simply because Qwest’s eleventh hour switching rates are lower than the obviously inflated 331T rates does not make them TELRIC-compliant. On the contrary, Qwest bears the burden of demonstrating that its new switching rates are TELRIC-compliant. Qwest has not done so, nor could it.

Qwest developed its new Colorado switching rates by changing critical inputs to the switching cost study, the HAI Model, submitted by AT&T and other CLECs in the 577T Proceeding. Those

³²⁷ See *Colorado Pricing Order* at 25-26.

³²⁸ See *id.*

³²⁹ *Colorado Reconsideration Pricing Order* at 7. As pointed out by the CPUC Staff, the “record in [the 577T docket] . . . establishes that Qwest’s proposed prices [*i.e.*, the 331T rates] were overstated through inappropriate cost factor calculations, use of incorrect productivity and inflation factors, and lack of inclusion of merger savings, technology improvements and business improvements.” CPUC Staff RRR at 3. The structure of Qwest’s switching rates “have not had a comprehensive review for over 11 years.” CPUC Staff RRR at 5. And Qwest’s switching rates are based on “historical costs.” CPUC Staff RRR at 5. *see also id.* at 4 (“The Qwest approach ignores the most fundamental TELRIC principle: Existing costs should not be included in wholesale price calculations”). AT&T’s cost study showed that the 331T recurring switching rates, were inflated by 277%.

changes were never reviewed – let alone approved – by the Colorado PUC, and they produced rates that are substantially inflated above TELRIC levels.

Fill Factor. Qwest’s switching cost studies improperly reduced the switching “fill factor” used in the HAI Model from 94% down to 82.5%.³³⁰ According to Qwest, more spare capacity was necessary in order in order to cover increases in demand for switching capacity.³³¹ That argument is baseless. Today’s switches are easily expandable. Accordingly, a proper forward-looking cost model would not invest in more switching and line port capacity than is required to have sufficient capacity to meet small, unexpected increases in demand and any necessary administrative functions. Beyond that, as demand grows, it is a simple matter to install additional line port interface circuit boards to serve new subscribers.³³² Qwest’s only response to this serious TELRIC error is that it needs excess capacity to account for the fact that some lines are unused but are still connected to the port. Qwest does not, however, show that it requires a lower fill factor to account for that excess capacity. As noted above, the 94% fill factor usually used by the HAI (and by the Commission’s Synthesis Cost model) is sufficient to account for those capacity requirements.

Port/Usage Split. Switch rate design has traditionally allocated a portion of switch costs to the fixed line port element and a portion to rates based on minutes of use. In accordance with TELRIC and the Commission’s *Local Competition Order*, rates for unbundled network elements are

³³⁰ The end-office switch fill factor represents the amount of capacity that the cost model assumes will be used by the switch. In the HAI Model, the fill factor determines the number of spare line port interfaces the Model will equip in a given switch. See Mercer/Chandler ¶ 25. The difference between the fill factor and 100% represents spare capacity that can be used to serve current and future demand for switched service. Because a small amount of spare capacity is required for administrative and other purposes, the proponents of the HAI Model supported a TELRIC-compliant fill factor is 94%.

³³¹ See Thompson Qwest I Decl. ¶¶ 59-61.

³³² See Mercer/Chandler Qwest I Decl. ¶ 28 (attached hereto in Attachment 7). Moreover, the HAI Model is conservatively designed, and implicitly allows for additional spare capacity beyond that reflected in the fill factor. See *id.* Modern switches can serve more than 100,000 lines. See *id.* In Colorado, for example, Qwest operates end office switches that approach this line size (Qwest’s Colorado Springs Main wire center serves more than 91,000 lines). See *id.* The HAI Model, however, uses end office inputs that include a default maximum line size that is considerably smaller than 100,000 lines (or the 91,000 that Qwest uses in its network). The value for this input in the HAI Model is 80,000. When the model encounters a wire center serving more than 75,200 business and residential lines (the product of 80,000 x .94), the model adds the investment for a second switch and distributes demand equally between the two switches. Thus, the *effective* fill factor for the HAI model is actually much lower than 94% (e.g., based on a switch that can serve 100,000, the HAI’s effective fill factor is only 72.5%).

to be established on a cost causative basis and “costs should be recovered in a manner that reflects the way they are incurred.”³³³ Under these cost causation principles, the portion of the switch costs that are non-usage-sensitive should be assigned to the flat-rated or fixed line port charge, and the portion of the switch costs that are usage-sensitive should be allocated to the minute-of-use rate element.³³⁴

The control structure of a modern end-office or tandem switch is a specialized computer.³³⁵ Switching systems have benefited from the same profound improvements in processor performance that have been observed over the past decade in personal computers. As a result, the principal limit to the capacity of today’s digital switches is not processing capacity, but rather the number of ports.³³⁶ Given the substantial increases in capacity of today’s switches, increased minutes-of-use does not result in increased switching costs.³³⁷

Indeed, a large portion of the total cost of a switch is associated with memory, processors, administrative and maintenance equipment and is incurred at the time a switch is placed in operation. These “getting started” costs do not vary with usage and accordingly should be assigned to the fixed port rate element. If a switch does exhaust its port capacity, then a wire center must incur the cost of a second switch. The exhaustion of the first switch’s ports is the primary cause for incurring the “getting started” costs for the second switch, and these costs should also be assigned to the port. Thus, the majority of the cost of today’s generation of digital switches is driven by ports, not by usage, and should be recovered in the fixed port rate element.

The HAI Model submitted by AT&T in Colorado addressed these issues by updating the model to reflect a more realistic 60/40 port/usage split.³³⁸ These values are consistent with the recent

³³³ *Local Competition Order* ¶ 741.

³³⁴ *See Mercer/Chandler Qwest I Decl.* ¶¶ 30-38.

³³⁵ *See Mercer/Chandler Qwest I Decl.* ¶ 32.

³³⁶ *See id.*

³³⁷ *See id.*

³³⁸ Older versions of the HAI Model, which was originally developed in 1997, used a 30/70 port to usage percentage split. The 30/70 split was based on the telecommunications data that was available at that time. As AT&T and other CLECs demonstrated in the 577T proceeding, however, the 30/70 port to usage split established several years ago is not appropriate for developing rates today, because that distribution of costs does not accurately reflect switch cost causation, as required by TELRIC principles. *See Mercer/Chandler Decl.* ¶ 31.

finding of the New York Public Service Commission (“NYPSC”) in the recent 2002 New York UNE Decision. In that proceeding, Verizon argued for a ratio of 36% fixed/64% usage sensitive claiming that its proposal was based on cost causation and consistent with its general practices. The NYPSC rejected Verizon’s arguments and ruled that only 34% of switch costs were usage sensitive and that the remaining 66% should be treated as fixed.³³⁹ The Illinois Commission also has recognized the largely fixed nature of switching costs and has established a 100% flat-rated switch rate with no minute of use element.³⁴⁰ In fact, more recent data shows that the Illinois was correct.³⁴¹ In more recent proceedings, *e.g.*, the Minnesota UNE rate proceedings, AT&T is advocating the use of a 100/0 port usage split.

The switching rates approved by the Colorado PUC, do not reflect these forward-looking port/usage ratios. Instead, Qwest’s switching rates reflect the old 30/70 port/usage ratio of costs. Qwest provides no legitimate evidence that such a split is appropriate for Colorado.³⁴² Overall, the Colorado PUC’s misallocation of port to switching costs overstates Qwest’s switching usage costs by 75%.³⁴³

³³⁹ Proceeding on Motion of the Commission to Examine New York Telephone Company’s Rates for Unbundled Network Elements, Case No. 98-C-1357, Order on Unbundled Network Element Rates, Before the NYPSC, at 34-36 (January 28, 2002).

³⁴⁰ *Investigation Into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection*, Network Elements, Transport, Termination of Traffic, Docket Nos. 96-0486 & 96-0569 (con.), 1998 Ill. PUC LEXIS 109 (Ill. Commerce Commission) (Feb. 17, 1998).

³⁴¹ See Chandler/Mercer Qwest I Decl. ¶ 34.

³⁴² The *only evidence* offered by Qwest in support of that ratio is that the Commission’s Synthesis Cost Model for computing USF support uses that ratio. But as explained above, the 30/70 port-usage split is outdated and is not supported by the record. Moreover, the Colorado PUC has made no finding that Qwest’s 30/70 port/usage split is appropriate for Colorado. Rather, the Colorado PUC adopted Qwest’s rates on the basis of a logical non-sequitor – that Qwest’s rates were lower than the massively overstated 331T rates.

³⁴³ See Mercer/Chandler Qwest I Decl. ¶ 37. The Commission’s *Maine 271 Order* is not to the contrary. In the *Maine 271 Order*, the Commission determined that the Maine Commission’s decision to use a 30/70 split was reasonable because: (1) the Maine Commission has discretion to determine the proper split based on the record evidence and (2) AT&T objected to the 30/70 split for the first time in opposition to Verizon’s Maine Section 271 application. See *Maine 271 Order* ¶¶ 29-30. Neither of these factors exist here. The Maine commission at least addressed the appropriate port/usage split, the Colorado PUC did not. Rather, as noted above, the Colorado PUC adopted Qwest’s proposed switching rates without any investigation because those rates were lower than the massively overstated 331T rates. Likewise, in contrast to the Maine state UNE rate proceeding, in which AT&T did not object to the 30/70 port/usage split, AT&T filed extensive cost studies in Colorado supporting the use of a 60/40 port/usage split. See Mercer/Chandler Qwest I Decl. ¶ 34. And that testimony was unopposed. It was not until Qwest sought reconsideration of the *Colorado Pricing Order*, that it challenged the use of a 60/40 split.

Vertical Features. Qwest's switching port rates, which are based on the HAI Model, reflect a \$0.38 add-on cost for vertical feature software.³⁴⁴ Because the switch costs used in the HAI Model already account for vertical feature software costs, *see* Mercer/Chandler Decl. ¶ 40, this is a clear double count. By adding the \$0.38 vertical features software costs to the port rates computed by the HAI Model (\$1.15), as Qwest did to calculate its switching rates, Qwest substantially inflated the switching port rate.³⁴⁵ Qwest has recognized this clear TELRIC error, and has promised to address it at some time in the future.³⁴⁶

D. Qwest's UNE Rates Create a "Price Squeeze" That Precludes Competitive Entry.

Section 271 bars the Commission from granting Qwest long distance authority unless the Commission finds that the UNE rates are "nondiscriminatory" as well as cost-based.³⁴⁷ The Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility's retail services to any class of customers.³⁴⁸ Thus, if Qwest's high end UNE rates foreclose UNE purchasers from economically providing residential competition, Qwest is engaged in "discrimination" and has not satisfied checklist item two. And because Section 271 categorically bars long distance authorization unless checklist item two has been "fully implemented," to the extent that Qwest's UNE rates in any state are discriminatory, the Application must be denied.

The Commission recently offered guidance on the type of "margin analysis" that should be employed to test whether a BOC's rates are, in fact, discriminatory. The Commission explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis including, intraLATA toll and interLATA toll revenue

³⁴⁴ Vertical features are additional telephone related services such as Caller ID, Call Waiting, Call Forwarding, voice mail, and so on.

³⁴⁵ Mercer/Chandler Qwest I Decl. ¶ 40.

³⁴⁶ *See* Qwest I Thomson Reply Decl. ¶ 2.

³⁴⁷ *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A).

³⁴⁸ *FPC v. Conway Corp.*, 426 U.S. 271, 278-79 (1976).

contributions, and the amount of federal and state universal service revenues that would be available to new entrants.³⁴⁹ The Commission also stated that a margin analysis should consider whether entry is viable using a mix of a UNE-based and resale-based local entry strategy.³⁵⁰

AT&T has conducted such an analysis and it demonstrates that a residential entry strategy that employs combination of UNE-based and facilities-based entry (the analysis assumes that a UNE-based approach where that is the most profitable entry mode, and a resale-based approach where that is the most profitable mode of entry) is *not* economically feasible in Montana or Washington. State-wide average *gross* margins (not accounting for carriers' internal costs) in those states are only \$ 4.26 (for Montana) and \$6.09 (for Washington).³⁵¹ Those margins do not even come close to covering an efficient carrier's internal costs of entry.³⁵² As demonstrated in the attached declaration of Stephen Bickley, an efficient new entrant's internal costs exceed \$10.00 in each of these states.³⁵³ After accounting for these internal costs of entry, the *net* margins that are available to new entrants in Montana, Washington and Wyoming are *negative*. Thus, competitive entry is not feasible in any of these states, which confirms that Qwest's UNE rates in these states are discriminatory in violation of Checklist Item 2.

IV. QWEST DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND RESALE

Qwest's joint application is also deficient because Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, all in violation of its checklist obligations. Certain state commissions in Qwest's region have

³⁴⁹ See, e.g., *Vermont 271 Order* ¶ 71.

³⁵⁰ See *id.* ¶ 69.

³⁵¹ See Lieberman/Pitkin Decl. ¶ 52.

³⁵² Qwest also filed a margin analysis. But as explained in the attached declaration of Michael Lieberman and Brian Pitkin, that analysis is fundamentally flawed because it improperly computes the amount of revenues and costs that new entrants in Qwest states can expect to incur.

³⁵³ In the past, the Commission has questioned whether the well-known internal cost estimate is that of an efficient carrier. The answer to that question is yes. As explained by Mr. Bickley, that internal cost figure does not reflect carriers' *current* internal costs, but their forward-looking costs that accounts for future savings associated with efficiencies and increased scale. See Bickley Decl. ¶¶ 1-2.

acknowledged a number of these violations and forced Qwest to reform its policies in those states. Qwest's continuing failure uniformly and fully to comply with its market-opening obligations under the Act requires denial of its application.

A. Qwest Denies CLECs Nondiscriminatory Interconnection.

Section 271(c)(2)(B)(i) requires a section 271 applicant to provide “[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).” 47 U.S.C. § 271(c)(2)(B)(i).³⁵⁴ Section 251(c) contains three requirements for the provision of interconnection. First, an ILEC must provide interconnection “at any technically feasible point within the carrier’s network.”³⁵⁵ Second, an ILEC must provide interconnection that is “at least equal in quality to that provided by the local exchange carrier to itself.”³⁵⁶ Finally, the ILEC must provide interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252.”³⁵⁷

Qwest violates each of these requirements in each of the four joint-application states. In all four states, Qwest imposes unreasonable and non-cost-based “entrance facility” charges on CLECs that wish to interconnect at a Qwest tandem or end office switch and thus drives up the cost of interconnection. Also in all four states, Qwest imposes substantial and discriminatory financial penalties on CLECs that fail to meet Qwest’s arbitrary 50 percent trunk utilization requirement – a requirement Qwest itself does not meet and for which Qwest suffers no comparable consequences. In all states but Washington, Qwest further restricts efficient interconnection by barring CLECs from placing interconnection traffic on existing trunk groups that carry interLATA toll traffic. In all four

³⁵⁴ Section 251(c)(2) imposes a duty on ILECs “to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network . . . for the transmission and routing of telephone exchange service and exchange access.” 47 U.S.C. § 251(c)(2)(A). The Commission has concluded that “interconnection” in section 252(c)(2) refers “only to the physical linking of two networks for the mutual exchange of traffic, . . . and not the transport and termination of traffic.” *Local Competition First Report and Order* ¶ 176.

³⁵⁵ 47 U.S.C. § 251(c)(2)(B). *See also* 47 C.F.R. § 51.305 (requiring interconnection “[a]t any technically feasible point”). In its *Local Competition Order*, the Commission identified a minimum set of technically feasible points of interconnection. *See Local Competition Order* ¶¶ 26, 210; 47 C.F.R. § 51.305(a)(2).

³⁵⁶ 47 U.S.C. § 251(c)(2)(C).

³⁵⁷ 47 U.S.C. § 251(c)(2)(D).

states, Qwest bars (or effectively bars) CLECs from placing interconnection traffic on private lines, and in all states but Montana it arbitrarily limits the length of interconnection trunks it will construct to 50 miles. Each of these restrictions has the anticompetitive effects of deterring and delaying facilities-based entry by driving up the cost of using facilities to interconnect with Qwest's network.

1. Qwest's "Entrance Facility" Charge Denies CLECs Reasonable Access To CLEC-Selected Points Of Interconnection ("POI").

Qwest's SGATs in all four states impose unlawful "entrance facility" charges on CLECs obtaining interconnection trunks from Qwest. There is no sound economic or engineering reason why Qwest should levy an "entrance facility" charge, which is essentially a loop charge, for these interconnection trunks, and such charges are therefore anticompetitive and inconsistent with the Commission's rules.³⁵⁸

When a CLEC wishes to establish interconnection between its switch and a Qwest switch, Qwest's SGATs deem *any* Qwest-provided transport between the CLEC switch (or other POI) and the nearest Qwest wire center (called the "serving wire center" or SWC) to be an "entrance facility." Whenever a CLEC wishes to establish a connection from its own switch to a Qwest switch using interconnection trunking provided by Qwest, Qwest requires the CLEC to purchase an "entrance facility" from the CLEC switch to the nearest Qwest serving wire center.³⁵⁹ These "entrance facilities" are considered to be "high speed digital loops" and are priced as such – *i.e.*, the charges for entrance facilities are flat-rated and *non*-distance-sensitive. If the CLEC wishes to establish interconnection with a Qwest switch other than the nearest Qwest switch, Qwest forces the CLEC to purchase both the entrance facility (to the Qwest SWC) and what it calls "direct trunked transport" between Qwest switches (*i.e.*, from the serving wire center to the CLEC's desired Qwest switch). Direct Trunked Transport is a flat-rated, distance-sensitive charge.³⁶⁰

³⁵⁸ See 47 U.S.C. §§ 251(c)(2), 252(d)(2); 47 C.F.R. § 51.705.

³⁵⁹ See SGAT § 7.1.2.1.

³⁶⁰ See Wilson Dec. ¶¶ 8-9; Freeberg Interconnection Dec. at ¶ 18 n.10.

Qwest’s “entrance facility” charges are unlawful because they do not reflect the way these costs are incurred. There is no economic or engineering difference whatsoever between the “entrance facility” – the transport link between the CLEC’s switch and the SWC – and the “direct trunked transport” – the second link between Qwest’s wire centers. Accordingly, there is no justification for creating separate “entrance facility” and “direct trunked transport” charges. Qwest has improperly borrowed the “entrance facility” concept from the context of access charges; in that context, entrance facilities are priced like loops and were originally designed to function as subsidy elements.³⁶¹

The principal effect of these “entrance facility” charges is dramatically to raise the price of interconnection, because the CLEC switch is often in close proximity to the Qwest “SWC.” The CLEC should be able to obtain “Direct Trunked Transport,” without need for any entrance facilities or other costs, continuously from the CLEC switch to the Qwest switch, whether a tandem or directly to an end office.³⁶² The CLEC should not be required to order an additional entrance facility, which only serves to raise the cost of interconnection, in violation of sections 251(c)(2) and 252(d)(2).³⁶³

Finally, and in all events, Qwest’s entrance facility charges also effectively deny CLECs’ their right to select a point of interconnection (“POI”) at any technically feasible point.³⁶⁴ A CLEC has the right to purchase interconnection trunks (at TELRIC-based rates) that connect the CLEC’s switch to a Qwest switch and to make the Qwest switch the point where traffic is exchanged between the two networks *and*, accordingly, the point at which reciprocal compensation obligations are

³⁶¹ Wilson Dec. ¶ 10.

³⁶² Wilson Dec. ¶ 11.

³⁶³ Although the SGATs state that CLECs may request other technically feasible means of interconnection, which Qwest will consider through the Bona Fide Request process (*see* SGAT § 7.1.1), this provision has nothing to do with Qwest’s classification of facilities between the CLEC switch and the Qwest SWC as “entrance facilities,” which Qwest insists on pricing as if the CLEC had ordered a loop. In other words, although CLECs may request other technically feasible physical arrangements for interconnection, it would still be the case that any Qwest-provided trunking between the CLEC switch and the nearest Qwest switch would be deemed an “entrance facility.” Wilson Dec. ¶ 12.

³⁶⁴ *See* Memorandum Op. and Order, *Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218, ¶ 52 (WCB July 17, 2002) (“Under the Commission’s rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA” (*citing* 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2))).

triggered. Section 7.1.2.1., however, unlawfully forces a CLEC that uses leased facilities to reach Qwest's switch to establish the POI at the CLEC's switch.

2. Qwest's Interconnection Arrangements Discriminate Against CLECs And Provide CLECs With Interconnection Arrangements Inferior To Those Qwest Provides For Its Own Connections.

Qwest's trunk forecasting requirements are discriminatory and unreasonable in violation of Qwest's interconnection obligations. First, if a CLEC forecasts a need for more trunks than Qwest *thinks* the CLEC will need, Qwest forces the CLEC to pay a construction deposit, which will not be returned if the CLEC's utilization falls below a certain threshold. To make matters worse, Qwest reserves the unilateral right to "snatch back" trunks if the CLEC's utilization of a trunk falls below 50 percent, and thus forces CLECs to incur the substantial non-recurring costs of reordering new trunks if the CLEC's traffic subsequently increases. These provisions are anticompetitive, unreasonable, and discriminatory.

Under Qwest's SGATs (§ 7.2.2.8.6), both the CLEC and Qwest forecast the trunking that will be necessary for interconnection between those two carriers in each coming quarter. Qwest's forecasts are invariably lower than the CLEC's. If the CLEC's utilization has been below 50% in the previous 18 months, and the CLEC's forecasts are higher, the CLEC must pay Qwest a deposit in order to obtain the full amount of trunking that it thinks it will need. If the CLEC's utilization does not reach 50 percent of the CLEC's forecast within 6 months, however, the CLEC loses its deposit (in whole or in part). *See* SGAT § 7.2.2.8.6.1.³⁶⁵

These provisions are unreasonable and discriminatory. The Commission has noted that "the requirement to provide interconnection on terms and conditions that are 'just, reasonable, and nondiscriminatory' means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function

³⁶⁵ In Washington, the same deposits are required on a trunk group basis rather than on the average of all trunks. While this difference is marginally better for CLECs, it still has the same result. Wilson Decl. ¶ 16; Washington SGAT § 7.2.2.8.6.

to its own retail operations.”³⁶⁶ Under section 251(c)(2)(C), the interconnection arrangements provided to CLECs must also be “equal in quality” to the connections an ILEC provides for itself, meaning that an ILEC must provide connections between its network and that of a requesting carrier “that is at least indistinguishable from that which the incumbent provides itself.”³⁶⁷ The Commission expressly included the probability of trunk blocking when defining this standard.³⁶⁸

The forecasts at issue in SGAT § 7.2.2.8.6 are made by both Qwest and the CLEC because each company is trying to predict what trunk capacity is needed so that no call blocking will occur.³⁶⁹ Qwest argues that it has the right to impose the deposit requirement “to give CLECs an incentive to provide accurate forecasts,”³⁷⁰ ignoring the fact that CLECs have no incentive to install, maintain and pay for a vast number of underutilized trunks to Qwest end offices, given that such policies cost the CLEC just as much in switch terminations as they do Qwest. Moreover, Qwest’s requirement puts a CLEC in the position of choosing between risking a Qwest-imposed financial penalty if it over-estimates its trunk utilization or risking customer-affecting blockage if it under-estimates utilization. Both options risk competitive impacts, and Qwest cannot be allowed to impose that choice on CLECs.³⁷¹

Qwest, of course, faces no such choice. Indeed, Qwest’s own trunk utilization in recent months has been consistently *below* 50 percent.³⁷² In violation of the requirement that CLECs be given parity treatment by an ILEC, Qwest does not hold itself to the 50 percent utilization standard it imposes on CLECs.³⁷³

³⁶⁶ *NJ 271 Order*, App. C., ¶ 19; *see also Local Competition Order* ¶ 218.

³⁶⁷ *Local Competition Order* ¶ 224.

³⁶⁸ “Trunk group blockage indicates that end users are experiencing difficulty completing or receiving calls, which may have a direct impact on the customer’s perception of a competitive LEC’s service quality.” *NJ 271 Order*, App. C., ¶ 18 n.635.

³⁶⁹ *See Wilson Decl.* ¶ 15.

³⁷⁰ *Freeberg Interconnection Decl.* at ¶ 118.

³⁷¹ *See Wilson Dec.* ¶ 20.

³⁷² *See Wilson Decl.* ¶ 16.

³⁷³ Qwest mischaracterizes the issue in July 29 Reply Comments (at 67-68). Because of the nature of their operations, virtually all CLECs average less than 50 percent utilization over any 18 month period, and thus would be required under

Compounding the inherent inequity of Qwest's insistence that a CLEC maintain a trunk utilization efficiency greater than Qwest itself can manage is the fact that it is generally more difficult for CLECs, with their much smaller networks, to achieve utilization levels equal to or greater than those of an entrenched incumbent.³⁷⁴ CLECs generally have smaller amounts of traffic than an ILEC, and that traffic is subject to more and greater variability, because the CLECs' customer bases change more rapidly than Qwest's.³⁷⁵ Thus, from an engineering management perspective, it is unreasonable to expect CLECs to achieve utilization levels higher than those of Qwest.³⁷⁶

The practical effect of these provisions is that CLECs scale back their facilities-based market entry to prevent excess blocking. When interconnection trunks are maintained at utilization levels that are high, there is the risk of excessive call blocking, to and from the Qwest network. If too many customers, or even one large customer, is put on the CLEC network without considering the trunking that is needed to carry the calls, excessive blocking will result in the interconnection trunks. AT&T will literally delay putting customers on their network, and will carefully manage when it adds traffic to the network, to prevent blocking that can be caused by Qwest's unreasonable and costly limitations. Qwest's construction deposit provisions are therefore unnecessary and blatantly anticompetitive.³⁷⁷

In Montana, Utah, and Wyoming, Qwest's SGATs further provide that Qwest may unilaterally determine that a CLEC is underutilizing its trunks and "snatch back" trunks from the CLEC regardless of the CLEC's needs or plans for the trunks it holds and for which it pays.³⁷⁸

Qwest's SGATs to place deposits to order the trunking they need. Rather than give Qwest deposits that they will almost certainly lose, CLECs would instead moderate their growth and delay placing traffic on interconnection trunks until they can avoid the need to place such deposits. *See* Wilson Decl. ¶ 21.

³⁷⁴ *See* Wilson Decl. ¶ 17.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ Wilson Decl. ¶ 20.

³⁷⁸ *See* Wilson Decl. ¶ 22; *see also* SGAT § 7.2.2.8.13. Once again, Qwest misses the point in its July 29 Reply Comments when it asserts that Qwest has never exercised its right to snatch back trunks from CLECs. *See* July 29 Reply Comments at 68. The SGAT provisions that give Qwest the right to snatch back trunks are unlawful on their face (and thus fail to satisfy the checklist). *See* Wilson Decl. ¶ 21.

CLECs have no economic incentive to install, maintain and pay for any significant number of underutilized trunks, and CLECs are in the best position to project their future needs for interconnection trunks. Only the CLEC should determine if it is appropriate to return underutilized trunks to Qwest. There is no reason why Qwest should have the authority unilaterally to determine whether a competitor may retain the trunks it is using.³⁷⁹ This policy effectively forces the CLEC to re-order the trunks later, and pay Qwest's sizeable nonrecurring costs a second time.³⁸⁰

In short, Qwest's SGATs make Qwest the overseer of a CLEC's trunk utilization, with the right (1) to determine unilaterally that the CLEC is not using its trunks according to utilization demands that Qwest does not meet itself and (2) to take back the trunks that Qwest wants, regardless of a CLEC's own projections and plans. This gives Qwest unprecedented and unreasonable power to disrupt its competitors' entry plans and businesses. Such discriminatory treatment is unlawful.

3. Qwest Unlawfully Requires CLECs To Place Interconnection Traffic On Separate Trunk Groups.

Qwest's SGATs in Montana and Wyoming (§ 7.2.2.9.3.2) prohibit CLECs from placing interconnection traffic on the trunk groups they have already established to carry toll traffic. And all of Qwest's SGATs (§ 7.3.1.1.2) effectively prevent CLECs from placing interconnection traffic on spare private line facilities, by charging CLECs private line rates for all trunks associated with a given facility, even if some trunks are available to carry interconnection traffic. These restrictions prevent CLECs from efficiently using their existing, spare trunk capacity for interconnection, and further drive up the costs of interconnection with Qwest.

Interexchange carriers such as AT&T have existing switched access trunk groups to Qwest switches that carry interstate long distance traffic. It would be efficient for AT&T to use these same trunk groups to carry local traffic as well. Instead, Qwest demands that CLECs use one set of trunk

³⁷⁹ Qwest's snatch back policy is also unreasonable in that it is much easier and more efficient for Qwest to internally manage and resize Qwest network trunks than it is to snatch back trunks from CLECs and then force a CLEC to re-acquire the trunks to accommodate its growth. *See Wilson Decl.* ¶ 24.

groups for interLATA calls and another set of trunk groups for local and intraLATA calls. This requirement increases the number of trunks, increases the cost of interconnection, and squanders available trunk resources. Indeed, it requires CLECs to establish two parallel trunks groups, each of which is operated at sub-optimal utilization, when one trunk group would suffice. And it makes it all the more difficult for CLECs to comply with Qwest's artificial utilization requirements.

There are no legitimate grounds for Qwest's separate trunk requirement. It is technically feasible to place interconnection traffic on interLATA trunk groups. AT&T has done so for years in states (such as Arizona and Washington) that have refused to let Qwest put up this barrier. In those states, AT&T provides Qwest with a Percent Local Usage ("PLU") factor to permit appropriate billing. And Qwest remains free to track CLEC usage through its switch records and bill the CLEC accordingly.³⁸¹

There is also no good reason for Qwest to prevent CLECs from using spare private line facilities for interconnection. CLECs buy special access or private line facilities from Qwest to reach end user customers. These same facilities can efficiently carry interconnection traffic, and proportional pricing can be used to appropriately charge the CLEC for the two types of traffic. By charging CLECs private line rates for the complete facility, including those spare trunks that are available for interconnection traffic and could otherwise be billed under the reciprocal compensation requirements, Qwest again effectively forces CLECs to build separate trunk groups for interconnection.

By forcing CLECs to build separate trunk groups to carry interconnection traffic, Qwest forces CLECs to overbuild their networks at a time when CLECs can least afford to do so, thereby substantially raising the cost of entry and deterring facilities-based competition. Qwest's unlawful and discriminatory conduct is particularly anticompetitive because Qwest faces no such restrictions

³⁸⁰ Notably, Washington has recognized that these policies are discriminatory and anticompetitive, and the Washington commission has allowed CLECs to avoid Qwest's snatch-back of trunks by advising Qwest of the reason for maintaining excess trunks. See Washington SGAT § 7.2.2.8.13.

³⁸¹ See Wilson Decl. ¶ 28.

today or in the future. Qwest will not build duplicate networks for local traffic as opposed to private line or interLATA use. It should not be permitted to deter competition by foisting such a costly and wasteful network-design requirement upon its competitors.³⁸²

Although the Washington commission agreed with AT&T that Qwest should permit interconnection traffic to be combined with special access traffic, Qwest's language implementing this order excludes special access traffic ordered under a federal tariff. *See* Washington SGAT § 7.3.1.1.2. This effectively re-imposes the original restrictions, since virtually all special access is ordered pursuant to federal tariff. Moreover, Washington's refusal to extend this policy on jurisdictional grounds is without merit. Washington would not be regulating or reducing the rates for interstate special access service; rather, it would merely be recognizing that not all trunks on a facility are used for special access, and those trunks therefore should not be priced as such.³⁸³

4. Qwest's Length Limitation On Interconnection Trunks Is Unlawful.

Qwest's SGATs in Washington, Utah, and Wyoming also arbitrarily limit the length of interconnection trunks that it will construct between Qwest switches to 50 miles. In other words, when a CLEC wishes to purchase interconnection trunks that would involve transport of more than 50 miles between Qwest switches, and Qwest lacks adequate capacity on such a route, Qwest requires the CLEC to build the additional capacity for Qwest. There is no legitimate justification for this anticompetitive, cost-raising requirement.

It is Qwest's obligation to "provide ... interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access."³⁸⁴ Thus, when a CLEC has chosen its own switch as its point of interconnection with Qwest, it is Qwest's responsibility to deliver the traffic to the chosen destination once that traffic has been handed off to Qwest. If Qwest must use trunking within its network that is more than 50 miles, and that

³⁸² *See* Wilson Dec. ¶¶ 29-32.

³⁸³ In all events, to the extent that Qwest's federal tariff states that CLECs must pay the special access rate when it places interconnection traffic on a private line facility, the tariff violates Section 252(d)(2), which requires TELRIC rates.

³⁸⁴ 47 U.S.C. § 251(c)(2)(A).

trunking is at capacity, it is *Qwest's* responsibility to perform the necessary upgrades in order to fulfill its obligations, not the CLEC's.³⁸⁵ Indeed, by substantially raising the cost to the CLEC of choosing its own switch as the POI, Qwest has materially diminished the CLEC's ability to choose its own POI, and at the margin Qwest effectively forces the CLEC to build to a meet-point rather than incur the penalties associated with Qwest's 50-mile limitation. *See* 47 U.S.C. § 251(c)(2) (CLEC has the right to choose point of interconnection at any technically feasible point).³⁸⁶ Qwest's 50-mile limitation is blatantly discriminatory and anticompetitive, and violates Section 251(c)(2). *See* Wilson Dec. ¶¶ 33-36.³⁸⁷

B. Qwest Denies CLECs Nondiscriminatory Access To Unbundled Network Elements.

Qwest discriminates against CLECs in the provisioning of unbundled network elements, in addition to OSS, in a number of ways that all violate its core checklist obligations. These include discrimination in (1) building new facilities to serve customers; (2) access to the network elements of Qwest's affiliates; and (3) combining UNEs with telecommunications services.

1. Qwest Discriminates Against CLECs That Place UNE Orders Requiring Construction of New Facilities.

Qwest has yet to fully implement its obligation to provide CLECs nondiscriminatory access to unbundled network elements in circumstances when a CLEC's UNE order requires construction of new facilities. It fails to meet its obligations in two respects.

First, in all states except Washington, Qwest may refuse to build the new facilities necessary to provision a CLEC's UNE order in circumstances when Qwest would build such facilities to provision its own customer's order. Second, in all states except Washington, Qwest is allowed to cancel a CLEC's UNE order (either immediately or, in Montana, after 30 days) if Qwest concludes

³⁸⁵ Qwest's 50-mile limitation applies only to trunking *within* Qwest's network – *i.e.*, between Qwest switches – and *not* to trunking that connects a CLEC switch to the nearest Qwest switch (which Qwest calls an "entrance facility").

³⁸⁶ Indeed, Qwest's Washington SGAT expressly requires the CLEC to build to a meet-point, which unambiguously deprives the CLEC of its right to choose its own POI (*e.g.*, at its own switch instead of at a meet-point).

³⁸⁷ Qwest's July 29 Reply Comments (at 70) mischaracterize the law in stating that "[w]hen neither carrier has available facilities between the respective carriers' switches that need to exchange calls, each carrier is on equal ground." That is

that capacity is not available, instead of holding the order indefinitely until capacity is available, as Qwest does for its own retail customers. This discriminatory policy allows a customer selecting Qwest for service that requires new capacity to keep its place in Qwest's "queue" for new facilities, while a customer who selects a CLEC finds its order cancelled and loses the priority it would otherwise have had for obtaining service had Qwest simply held the CLEC's order.

a. In Montana, Utah, and Wyoming, if a CLEC orders an unbundled loop and the facilities are not currently available, Qwest's SGATs provide that Qwest will build the loop only "if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic Local Exchange Service." SGAT § 9.1.2.1. As the SGAT states, "[i]n other situations, Qwest does not agree that it is obligated to build UNEs, but it will consider requests to build UNEs pursuant to Section 9.19 of this Agreement." *Id.* And under Section 9.19, Qwest applies the following standard: "Qwest will conduct an individual financial assessment of any request that requires construction of network capacity, facilities, or space for access to or use of UNEs." SGAT § 9.19.

As the Colorado and Washington commissions correctly recognized, these provisions are discriminatory. Those commissions have required Qwest to amend its SGATs to require Qwest to build a new facility whenever it would build one for itself.³⁸⁸

Under the non-Washington SGATs at issue here, however, Qwest is the only LEC that can effectively compete for customers needing new loops (because it can refuse to build loops for anyone but itself). When building new loops for CLECs, Qwest would rarely, if ever, be required physically to install new fiber in new conduit laid in newly acquired rights of way between an end office and the customer premises. Rather, Qwest would almost always be able to take advantage of its existing,

not correct. The CLEC has a statutory right to select its own POI, and Qwest has a responsibility to deliver traffic to that CLEC-selected POI.

³⁸⁸ Wilson Decl. ¶ 41; *see* Washington SGAT §§ 9.1.2.1 and 9.19.

ratepayer-financed infrastructure – *i.e.*, poles, conduits, rights of way, and copper or fiber conductors – that Qwest has already deployed and is using today, and could quickly and cheaply augment those facilities by, for example, adding newer electronics on optical fiber to increase capacity for additional loops and transport on existing fiber. A CLEC, by contrast, would virtually always incur the far greater, and usually prohibitive, costs of building a new loop from scratch, including obtaining rights of way, and installing conduit and new fiber.³⁸⁹ Thus, by refusing to build facilities needed to fulfill a CLEC’s UNE order, Qwest ensures that only Qwest is in a position economically to provide service for customers needing new facilities.

Moreover, Qwest’s invocation of its “provider of last resort” and “eligible telecommunications carrier” obligations is obviously inapposite, because those obligations are limited to DS0 loops. By providing Qwest standardless discretion to refuse to build for CLECs in circumstances when Qwest would build for itself, the non-Washington SGATs fail to meet the requirements of Section 251(c).

b. Montana, Utah, and Wyoming permit Qwest to discriminate against CLEC UNE orders in one additional, important respect with respect to the building of new facilities. In Montana, the SGAT permits Qwest, when it does not have capacity to fill a UNE order, to hold a CLEC order for 30 days (to see whether facilities become available), and then, if capacity remains unavailable, to cancel the order.³⁹⁰ At that point, the CLEC must “submit a request to build UNEs pursuant to Section 9.19 of this Agreement.” In Utah and Wyoming, Qwest rejects the order immediately.³⁹¹

Each of these SGATs is discriminatory, because none requires Qwest to treat the CLEC’s order as Qwest would treat a comparable order from one of its own retail customers. Qwest holds its customers’ orders indefinitely until Qwest has built the facilities to provision the requested service. That policy ensures that a Qwest customer’s priority for receiving service contingent on new facilities

³⁸⁹ Wilson Decl. ¶ 41.

³⁹⁰ SGAT §§ 9.1.2.1.3.2; 9.2.2.16.

³⁹¹ Wilson Decl. ¶ 46.

is measured from the time of its original order for service; a CLEC customer, by contrast, loses its place in the “queue” when Qwest cancels the CLEC’s order and requires submission of a new order.³⁹² The discrimination is compounded by the superior knowledge and limited disclosure obligations that Qwest enjoys with respect to the constraints on existing capacity and the planning of new construction, which ensures that Qwest will always be better able than CLECs to alert prospective customers as to the implications of new-facilities construction for providing the service they request.³⁹³ Qwest should therefore be required to treat CLEC UNE orders no differently than orders from Qwest retail customers when those orders will require construction of new facilities.

2. Qwest Denies CLECs Unbundled Access To The Network Elements Of Qwest Affiliates.

Qwest also fails to provide nondiscriminatory access to unbundled network elements in all four states because it does not permit CLECs to obtain nondiscriminatory unbundled access to the network elements – and, in particular, the local transport and dark fiber – of Qwest Corp.’s affiliates pursuant to sections 251 and 252 of the Act.³⁹⁴ As Colorado has correctly recognized, those affiliates are subject to the Act’s unbundling requirements. Qwest’s refusal to give competitors access comparable to what Qwest enjoys is therefore discriminatory and unlawful.

Section 251(h) defines an incumbent LEC as a LEC that provided local exchange service in an area at the time of enactment of the 1996 Act and was deemed to be a member of NECA, or “a person or entity that, on or after such date of enactment, became a successor or assign” of such a LEC. Qwest Communications International (“QCI”) is a holding company formed by the merger between Qwest and U S WEST, which has two relevant subsidiaries: Qwest Corporation (“QC”), the successor to the pre-merger U S WEST local exchange operations, and Qwest Communications Corporation (“QCC”), the successor to the pre-merger Qwest’s operations. QC is indisputably an ILEC for purposes of Section 251(h). QCC, however, has deployed its own fiber transport facilities

³⁹² Wilson Decl. ¶ 44.

³⁹³ *Id.*

³⁹⁴ See SGAT § 9.7.2.20.

that can be used in the provision of local exchange service, and QC and QCC are now part of a merged firm that is integrating its operations. To the extent that QC is using or has access rights to QCC's transport facilities, QCC is a "successor or assign" of QC under Section 251(h) and thus would be subject to the Act's unbundling requirements as an ILEC.

This is clear from both the case law and the Commission's precedents. For example, when the Commission approved the Qwest/U S WEST merger, the Commission determined that the Qwest affiliates would be deemed "successors and assigns" under section 251(h) of the Act if Qwest attempted to transfer local exchange operations to the affiliate.³⁹⁵ In that proceeding, McLeodUSA argued that the Commission should reject the merger application because, among other things, the merged entity "will have the ability to divert favored, high-volume customers to the affiliated [competitive] LEC, which can become the provider of new, innovative services, while the [incumbent] LEC's traditional local services are degraded and serve only residential users and other [competitive] LECs."³⁹⁶ McLeod further argued that, after the merger, U S WEST will be able to use Qwest and its affiliates as competitive LECs "to attempt to avoid the [incumbent] LEC obligations under section 251(c)(4) of the Act to offer for resale, at wholesale rates, any services the [incumbent] LEC offers at retail." The Commission rejected McLeod's argument, and expressly stated that "[s]uch an affiliate of U S WEST would be considered a 'successor or assign' of U S WEST for the purposes of the obligations imposed by section 251(c)(4). Therefore, the competitive LEC hypothesized by McLeod would be treated as an incumbent LEC under section 251(c)(4)."³⁹⁷

Similarly, the D.C. Circuit held that SBC and Ameritech could not avoid their Section 251(c) obligations with respect to advanced services merely by shifting those operations to an affiliate.³⁹⁸ In finding the affiliate to be a "successor or assign," the court specifically noted that the "affiliate

³⁹⁵ *Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, CC Docket No. 99-272, 15 FCC Red. 5376, ¶ 45 (2000).

³⁹⁶ *Id.* at n.131.

³⁹⁷ *Id.* at ¶ 45 (footnotes omitted).

³⁹⁸ See *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

markets the same category of services to the same body of potential customers as did the [ILEC].” Moreover, the court found that the fact that the ILEC had not transferred “its monopoly assets” to the affiliate was irrelevant. Given that the affiliate was providing certain local exchange services (*i.e.*, local advanced services), the court held that the Commission could not shield those operations from the requirement of Section 251(c) through “the technique of defining successor and assign to exclude the transfer” of those operations.³⁹⁹ Indeed, the court held that allowing an ILEC to “sideslip § 251(c)’s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme.”⁴⁰⁰

Qwest’s attempts to shield the local facilities owned by its QCC affiliate from Section 251(c) are equally unlawful. As the Colorado Staff concluded, “[a]s it is occurring today, and as it continues into the future, the merged entities’ facilities are becoming operationally integrated, and it is becoming virtually impossible to distinguish between fiber routes used exclusively for long distance or data services, and fiber routes that contain fibers used for transport of local exchange services.”⁴⁰¹ As a result, the staff recommended and the Hearing Officer agreed that Qwest should amend its SGAT in Colorado to offer unbundled access to any QCC dark fiber to which QC has access rights.⁴⁰² Qwest has yet to comply with the Act, however, in the four states at issue here. For this reason as well, the Application should be denied.

³⁹⁹ *ASCENT*, 235 F.3d at 666-67.

⁴⁰⁰ Indeed, the court dismissed such reasoning as improper “legal jujitsu.” *Id.* at 667 (“[T]he Commission is using language designed by Congress as an added limitation on an ILEC’s ability to offer telecommunications services as a statutory device to *ameliorate* § 251(c)’s restriction. We do not think that in the absence of the successor and assign limitation an ILEC would be permitted to circumvent § 251(c)’s obligations merely by setting up an affiliate to offer telecommunications services. The Commission is thus using the successor and assign *limitation* as a form of legal jujitsu to justify its *relaxation* of § 251’s restrictions”).

⁴⁰¹ Colorado Staff Report on Emerging Services at 9 (Jan. 10, 2002).

⁴⁰² See SGAT § 9.7.2.20 (“Qwest shall allow CLEC access Dark Fiber owned directly by Qwest, or to which Qwest has a right of access resulting from agreement with a third party, whether or not affiliated with Qwest. CLEC shall have access to such fiber to the same extent that Qwest has access to such fiber”).

C. Qwest Fails To Comply With Its Obligation To Provide Unbundled Switching.

Section 271(c)(2)(B)(vi) of the competitive checklist requires a BOC to provide “[l]ocal switching unbundled from transport, local transmission, or other services.”⁴⁰³ Qwest fails in two ways to satisfy the requirement to provide unbundled local switching. First, Qwest refuses to provide switching or UNE-P when the end user has 3 or more lines in a wire center (instead of, as the Commission rules allow, three or more lines in a single *location*). Second, Qwest discriminates against CLECs by providing them with low quality packet switching.

1. Qwest Improperly Exploits The Commission’s Narrow Switching Carve Out Exception To Avoid Full Compliance With Its Obligation to Provide Switching As An Unbundled Network Element.

Qwest is obligated to make unbundled local switching available to competitive LECs. The Commission established a narrow “exception” to this obligation, such that ILECs who provide nondiscriminatory, cost-based access to enhanced extended links (“EEL”) are not required to provide access to unbundled switching in the most dense urban zones in the top 50 metropolitan statistical areas (“MSAs”) to a CLEC where the end user has four or more lines.⁴⁰⁴

Qwest’s Utah and Washington SGATs provide that “[t]his exclusion will be calculated using the number of DSO-equivalent access lines CLEC intends to serve an End User Customer within a Wire Center.”⁴⁰⁵ Under this provision, Qwest will count the total number of lines an individual customer has in a wire center to determine whether this exception applies.⁴⁰⁶ This practice violates Qwest’s obligation to provide unbundled switching, because counting lines on a “per-wire-center” basis rather than on a per-location basis unreasonably extends the Commission’s narrow exception.

Indeed, this issue was resolved recently in the *Virginia Arbitration Order*. In that order, the Bureau held that the exception to the unbundled switching requirement for customers with four or

⁴⁰³ 47 U.S.C. § 271(c)(2)(B)(vi).

⁴⁰⁴ *Id.* ¶¶ 253 & 278.

⁴⁰⁵ SGAT §§ 9.11.2.5.2, *see also id.* § 9.11.2.5.1. In this four-state application, this issue is applicable only to Utah and Washington, because Salt Lake City and Seattle are the only MSAs in these states in which the switching carve out exception applies.

⁴⁰⁶ *See* Simpson/Stewart Switching Decl. ¶ 21.

more lines “applies on a ‘per location’ basis,” and not on a “per-customer per wire center” basis, as Qwest’s SGATs provide. The Bureau expressly found that “rule 51.319(c)(2) is best interpreted as applying when the competitive LEC is serving a customer that has four or more lines at a single location.” *Id.* ¶ 360. As the Bureau explained, the “per-location” method is the only interpretation of the UNE Remand Order that is consistent with the language of the order and the purposes of the four-line exception. *Id.* ¶¶ 361-63. The *Virginia Arbitration Order* thus definitively establishes that Qwest’s Utah and Washington SGATs are unlawful and fail to satisfy section 271(c)(2)(B)(vi).

2. Qwest Improperly Discriminates Against CLECs By Denying Them High-Quality Packet Switching Functionality.

Qwest also fails to satisfy section 271(c)(2)(B)(vi) by failing to provide unbundled packet switching⁴⁰⁷ on a nondiscriminatory basis. The Commission has ruled that where the ILEC has deployed digital loop carrier (“DLC”) systems⁴⁰⁸ (and where spare copper facilities are not available or adequate) and the ILEC has located its DSLAM in a remote terminal but does not permit CLECs to collocate their DSLAMs in the ILEC’s remote terminal on the same terms and conditions that apply to the ILEC DSLAM, the ILEC must provide CLECs with access to unbundled packet switching.⁴⁰⁹ Qwest plans to remotely deploy DSLAMs on an increasingly broad scale,⁴¹⁰ and has acknowledged that this deployment will require it to provide CLECs access to unbundled packet switching.⁴¹¹

Although Qwest is obligated to provide unbundled packet switching on a non-discriminatory basis, it has flouted that obligation by offering CLECs only the lowest quality ATM connection from

⁴⁰⁷ Packet switching dividing messages between network users into units called “packets” (also known as “frames” or “cells”) and then routing the packets between network users. *UNE Remand Order* ¶ 302. Critical to this process is the Digital Subscriber Line Access Multiplexer (“DSLAM”), which splits voice (low band) and data (high band) signals. *Id.*, ¶ 303. The low band, voice signal is transmitted toward a circuit switch, and the high band, data signal is combined with that of multiple lines in packet format and transmitted to a packet switch, typically ATM or IP. *Id.*

⁴⁰⁸ In DLC, some portion of the end user’s copper loop is replaced with a fiber segment (or shared copper) at a remote terminal between the end user’s premises and the ILEC’s switch. *UNE Remand Order* ¶ 313.

⁴⁰⁹ *UNE Remand Order* ¶ 313.

⁴¹⁰ See Wilson Decl. ¶ 72.

⁴¹¹ See Simpson/Stewart Switching Decl. ¶ 52.

the DSLAM to the CLEC equipment.⁴¹² Unspecified Bit Rate Service (“UBRS”) is the poorest of five grades of service offered by Qwest to its retail customers,⁴¹³ but it is the only grade of service Qwest makes available to CLECs and their retail customers. Qwest acknowledges that UBRS is suitable only for “non- real-time applications that are very tolerant to delay, delay variation and cell loss.”⁴¹⁴ Thus, the connection that Qwest is providing is only suitable for email and downloading internet information, and not suitable for streaming audio, streaming video, VoIP or other internet-based services that define current high capacity service.⁴¹⁵

Thus, while Qwest offers multiple grades of service from which its retail customers may select, CLECs and their customers are only offered the worst performing class of service. Such discriminatory treatment precludes a finding that Qwest fulfills its obligation to provide nondiscriminatory access to packet switching.

D. Qwest Denies CLECs Reasonable And Non-Discriminatory Access To Unbundled Local Transport.

Qwest’s Montana, Utah, and Wyoming SGATs do not provide CLECs just and reasonable access to unbundled dedicated local transport.⁴¹⁶ Qwest requires CLECs to purchase both Unbundled Dedicated Interoffice Transport (“UDIT”) and “Extended Unbundled Dedicated Interoffice Transport” (“EUDIT”). The latter, however, is a flat-rated, non-distance-sensitive charge that serves only to raise the cost of purchasing transport. The improper and unnecessary EUDIT charge has been eliminated by at least two state commissions in the Qwest region (Washington and Colorado⁴¹⁷), and

⁴¹² See Wilson Decl. ¶ 73.

⁴¹³ From best to poorest, the 5 grades of service are: CBR: Constant Bit Rate; VBRrt: Variable BitRate—real-time; VBRnrt: Variable Bit Rate—non real-time; ABR: Available Bit Rate;UBR: Unspecified Bit Rate. See Wilson Decl. ¶ 73.

⁴¹⁴ *Id.*, citing Exhibit K LW-ES-6: Qwest Technical Publication 77408, Unbundled Packet Switching, Issue C, January 2002, Paragraph 2.2.2.

⁴¹⁵ *Id.*

⁴¹⁶ See SGAT § 9.6.1.1.

⁴¹⁷ See *In re Investigation Into [Qwest’s] Compliance With Section 271*, Washington Utils. & Transp. Comm’n Docket Nos. UT-003022 & UT-003040, Twenty-Fourth Supp. Order at 11 (Dec. 20, 2001); Colorado SGAT § 9.6.1.1. Notably, Utah has ordered Qwest to establish distance sensitive rates for EUDIT, but Qwest has not yet done so. See Wilson Decl. ¶ 63.

the Commission should now confirm that its use in the other three states subject to this joint application violates the requirements of Checklist Item 5.

The Commission requires an ILEC to provide “unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers.”⁴¹⁸ At a minimum, this requires ILECs to provide unbundled interoffice facilities between “end offices and serving wire centers (“SWCs”), SWCs and interexchange carrier (“IXC”) points of presence (“POPs”), tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers.”⁴¹⁹ “[A]n interoffice facility could be used by a competitor to connect to the incumbent LECs switch or to the competitor’s collocated equipment.”⁴²⁰ Significantly, the Commission requires dedicated transport to be recovered through a flat-rated charge,⁴²¹ reflecting the general rule that the costs for network elements “must recover costs in a manner that reflects the way they are incurred.”⁴²²

Qwest’s EUDIT rates structure violates these rules, because the rate for the EUDIT is non-distance sensitive. Qwest’s UDIT charge applies to dedicated transport between Qwest’s wire centers. Where, however, a CLEC wants dedicated transport from *its* wire center (or an IXC from its POP) to a Qwest wire center, the CLEC must order EUDIT.⁴²³ Thus, the total price for dedicated transport from a CLEC wire center to a Qwest wire center is the sum of UDIT and EUDIT, rather than the price for the total facility distance based on UDIT alone. EUDIT is a flat-rated, non-distance sensitive charge. In practice, the EUDIT rate is usually identical to Qwest’s loop rate, effectively treating the CLEC as if it were an end user instead of a local exchange carrier. By imposing the

⁴¹⁸ *UNE Remand Order* ¶ 323.

⁴¹⁹ *Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).

⁴²⁰ *Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(2)(C).

⁴²¹ 47 C.F. R. §§ 51.507(a) and 51.509(c); *Local Competition Order*, ¶ 744.

⁴²² *Local Competition Order* ¶ 743.

⁴²³ *See Wilson Decl.* ¶ 58.

EUDIT charge on competitors, Qwest greatly increases the total cost of obtaining unbundled transport.⁴²⁴

Qwest's EUDIT charge violates its checklist obligations because it fails to reflect the way costs are incurred. There is no basis in either economics or engineering for distinguishing between the transport between the CLEC's switch and the first Qwest wire center (called the "serving wire center" or SWC by Qwest) and the transport between Qwest's wire centers.⁴²⁵ As such, there is no basis for creating separate UDIT and EUDIT charges.

Indeed, the EUDIT charge deters CLECs from building facilities to a meet point between a CLEC wire center and the Qwest SWC. Because the EUDIT is not distance-sensitive, a CLEC will have to pay the entire EUDIT charge even if it builds facilities out to some point closer to the Qwest SWC.⁴²⁶ If the CLEC must pay the entire EUDIT rate, it has no incentive to build any of its own facilities between its wire center and Qwest's SWC. This alone demonstrates that the EUDIT is not cost-based, as required under § 252(d) of the Act.

Qwest's scheme is also discriminatory. Qwest permits CLECs to use UDIT to connect to another independent telecommunications carrier or local exchange carrier using a midspan meet arrangement, which is priced on a fixed and per mile basis.⁴²⁷ Thus, if a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT.⁴²⁸ If a CLEC wants dedicated transport to connect a Qwest wire center to the CLEC's own wire center, however, it must use a non-distance sensitive EUDIT.⁴²⁹ For all these reasons, Qwest's imposition of EUDIT charges deny CLECs reasonable and nondiscriminatory access to unbundled local transport.

⁴²⁴ *Id.*

⁴²⁵ *See* Wilson Decl. ¶ 59.

⁴²⁶ *See* Wilson Decl. ¶ 60.

⁴²⁷ *See* Wilson Decl. ¶ 61.

⁴²⁸ Qwest made this concession because that is how it has always treated neighboring independent LECs. *See* Wilson Decl. ¶ 61.

⁴²⁹ *Id.*

E. Qwest Denies CLECs Reasonable Access To Unbundled Dark Fiber By Impermissibly Applying The Commission's Test For Use Restrictions on EELs and By Providing Lower Quality Dark Fiber To CLECs Than It Provides To Others.

All four of Qwest's SGATs unlawfully restrict the use of dark fiber by applying the "use restrictions" test that the FCC adopted for Enhanced Extended Links ("EELs"), which are loop-transport combinations that are already combined in the ILECs' network.⁴³⁰ The use restrictions have no possible application to dark fiber, because CLECs by definition always light (and generally combine) unbundled dark fiber themselves.

The Commission's use restrictions on EELs have only limited application. As the Commission noted in the *Supplemental Order Clarification* (§ 2), "incumbent LECs routinely provide the functional equivalent of combinations of unbundled loops and transport network elements (also referred to as the enhanced extended link) through their special access offerings." As the Commission further explained, 47 C.F.R. § 51.315(b) "precludes the incumbent LECs from *separating* loop and transport elements that are *currently combined*," and therefore absent a special restriction "a requesting carrier could obtain these combinations at unbundled network element prices." *Id.* (emphasis added). Because the Commission had certain concerns about the ability of CLECs to convert existing loop-transport combinations to UNEs, the Commission adopted an interim rule that prohibits CLECs from converting such combinations to UNEs unless the CLEC is providing a "significant amount of local exchange service."⁴³¹ The use restrictions do not apply, however, when the CLEC combines loop and transport itself in its own collocation, as Qwest itself has acknowledged.⁴³²

⁴³⁰ See SGAT § 9.7.2.9 ("CLEC shall not use UDF [unbundled dark fiber] that is part of a loop-transport combination, as a substitute for special or switched Access Services, except to the extent CLEC provides a 'significant amount of local exchange traffic' to its End Users over the UDF as set forth by the FCC").

⁴³¹ See *id.* § 1.

⁴³² See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of Qwest at 6 (April 5, 2001) ("A competitive LEC can combine its UNE high-capacity loops with its UNE high-capacity transport at its collocation space to create a complete circuit to be used for exchange access purposes. This ability is not at issue in this proceeding").

Accordingly, the Commission's use restrictions do not apply to dark fiber. By definition, CLECs light and usually combine dark fiber themselves in their own collocation cages. Therefore, Qwest's attempts to restrict the availability of unbundled dark fiber are patently unlawful.

Qwest also offers discriminatory and inferior access to dark fiber. For example, when Qwest provides dark fiber to its own customers, it guarantees that it will maintain transmission performance at the designed transmission parameters, and guarantees to restore the fibers to meet transmission design if they fall below the design standards. For CLECs, however, Qwest makes no such guarantee, and indeed, states only that "Qwest considers a fiber as good when there is optical continuity" regardless of performance. *See Wilson Decl.* ¶ 67. These policies are discriminatory and violate the Act.

F. Qwest Denies CLECs Nondiscriminatory Access To The NID.

Qwest's denial of reasonable, nondiscriminatory access to the network interface device (NID) is particularly anticompetitive. Although a CLEC may win a new customer and be anxious to establish facilities-based service for that customer, Qwest's policies can make it impossible for the CLEC to do so. That is because Qwest refuses to permit the removal of its unused loops from the protector side of the NID to make room for a CLEC that wins the customer to attach its loops.⁴³³

This issue arises principally in the context of AT&T's cable telephony offerings, where AT&T seeks to provide its own loops to multi-tenant dwellings. It is often the case that such buildings have covenants that prohibit competitors from installing a new NID. In those instances, AT&T must have access to the protector side of the existing Qwest NID. Absent such access, AT&T cannot serve the customer.⁴³⁴ Indeed, it is particularly costly and unreasonable for a CLEC to take its own loop facilities all the way to a customer's building only to find out that it can neither install a new NID nor use the protector side of the Qwest NID.

⁴³³ *See* SGAT § 9.5.2.1 and 9.5.2.5.

⁴³⁴ *Wilson Decl.* ¶ 54.

Under Qwest's SGATs, however, a CLEC may use that NID only if space permits. Where, as is often the case, Qwest's unused loops remain attached to the only available terminals, Qwest refuses to remove, or let CLECs remove, those unused loops. Although Qwest purports to advance a "safety" rationale for this refusal, there is in reality no valid "safety" objection at all.⁴³⁵ The Commission should reject the Application, because where CLECs can provide facilities-based service to a customer only through accessing a single, existing NID, an ILEC may not block such access by refusing to allow the removal of its unused loops.

G. Qwest Fails To Make DSL Available For Resale On Reasonable And Nondiscriminatory Terms And Conditions.

Checklist item 14 states that a BOC must make "telecommunications services . . . available for resale in accordance with the requirements of section 251(c)(4) and section 252(d)(3)." Section 251(c)(4) imposes on incumbent LECs the duty to "offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." The Commission has held that these requirements apply fully to the retail sale of digital subscriber line ("DSL") based telecommunications services.⁴³⁶ Qwest has not satisfied its resale obligations because it has failed to offer for resale the DSL-based services that it provides to the Microsoft Network, L.L.C. ("MSN"), an Internet service provider ("ISP").

An investigation by the Minnesota Department of Commerce ("DOC") has revealed that Qwest has entered into an arrangement with MSN whereby Qwest is selling DSL transmission services to MSN pursuant to its publicly-filed tariff, but is also providing typical retailing functions, including marketing the service to end-users, billing end-users, and collecting payment from end-users, pursuant to off-tariff, non-public arrangements with MSN. The precise nature of these arrangements is not yet known because Qwest has not disclosed the actual contracts and has provided

⁴³⁵ Wilson Decl. ¶ 55.

⁴³⁶ See Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-330, CC Docket No. 98-147, ¶ 3 (1999) ("1999 Second Advanced Services R&O") ("we conclude that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the . . . discounted resale obligation"), *aff'd*, *ASCENT v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

only the barest descriptions of what they contain. The information it has disclosed, however, confirms that Qwest is providing a service “at retail,” and, therefore, that it is violating the Act’s resale requirements because it is not making that service available to other telecommunications carriers at wholesale rates. Accordingly, on the current record, the Commission cannot make a reasoned finding that Qwest (which has the burden of proof) has demonstrated compliance with its resale obligations.

Rather than bring its agreements into the light of day, Qwest instead filed a Petition for Declaratory Ruling with the Commission, seeking a ruling that the Act’s resale obligations do not apply “to an incumbent LEC that serves as a billing, collection, and marketing agent for an unaffiliated ISP.”⁴³⁷ Qwest’s Petition makes two legal arguments in support of its attempt to escape statutory resale obligations, neither of which has merit. First, Qwest argues that its arrangement with MSN falls into a narrow exception to the general resale rules providing that DSL services “sold to [ISPs] as an input component to the [ISPs’] retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale.”⁴³⁸ Far from supporting Qwest’s position, Rule 605(c) forecloses it. This rule permits ILECs to resell bulk DSL services to ISPs without also offering those services for resale, but that exception to the Act’s resale requirement applies *only* where the particular service is one in which the ISP “that purchases a bulk DSL service must itself, rather than the incumbent, provide . . . typical retail services to the ultimate consumer.”⁴³⁹ The “typical retail services” identified by the Commission included “sole responsibility for marketing, ordering, installation, maintenance, repair, billing, and collections vis-à-vis the end-user subscriber.”⁴⁴⁰ Because Qwest is providing these

⁴³⁷ See Petition for Declaratory Ruling, Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides to MSN Are Not “Retail” Services Subject to Resale Under Section 251(c)(4) of the Act, WC Docket No. 02-77, at 14 (filed April 3, 2002) (“Petition”).

⁴³⁸ 47 C.F.R. § 51.605(c). See Petition at 8-11.

⁴³⁹ 1999 *Second Advanced Services R&O* ¶ 15 (emphasis added).

⁴⁴⁰ *Id.* (emphases added).

quintessential retail functions to end users, the DSL-based services that it is providing to MSN do not fall within the Rule 605(c) exception and therefore are subject to the Act's resale requirements.

Qwest alternatively claims that the Internet access service that customers purchase under Qwest's arrangement with MSN is a bundled information service (rather than a telecommunications service) and that Qwest has no resale obligation with respect to that service because § 251(c)(4) applies only to telecommunications services.⁴⁴¹ This claim ignores that the service at issue is not the Internet service that is provided to subscribers, but rather the DSL service Qwest provides to MSN. And that service plainly is a telecommunications service, as the Commission has already expressly and properly held.⁴⁴² Qwest therefore has an obligation to offer for resale at wholesale rates that DSL-based transport service, and its failure to do so precludes a finding of compliance with checklist item 14.

V. QWEST HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY.

"As a pre-condition to entry under section 271,"⁴⁴³ Qwest and its section 272 affiliate must present evidence, not "paper promises," that establishes they will comply "with the requirements of section 272."⁴⁴⁴ As the Commission has frequently stressed, "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."⁴⁴⁵

Qwest and its section 272 affiliate, QCC, wholly fail to meet their burden. In fact, earlier this year an Administrative Law Judge for the Minnesota Commission ("Minnesota ALJ"), facing

⁴⁴¹ Qwest PSC Petition at 12-14.

⁴⁴² See, e.g., *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012, ¶¶ 11, 66-67 (1998); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 19237, ¶ 3 (1999); *ASCENT*, 235 F.3d at 668 ("Congress did not treat advanced services differently from other telecommunications services").

⁴⁴³ *Non-Accounting Safeguards Third Order On Reconsideration* ¶ 2.

⁴⁴⁴ 47 U.S.C. § 271(d)(3)(B); *Michigan 271 Order* ¶ 55 (holding that "paper promises" cannot satisfy the BOC's burden under § 271).

⁴⁴⁵ *Texas 271 Order* ¶ 395 (quoting *Michigan 271 Order* ¶ 346).

virtually the same Qwest declarations and supporting materials on section 272 compliance that are now before this Commission, found that Qwest had failed to meet its burden to establish *six* of the fundamental requirements imposed under section 272. Specifically, the ALJ ruled that Qwest failed to show that it and its section 272 affiliate operated independently, as required by § 272(b)(1), or had separate officers and directors, as required by § 272(b)(3), or had dealt with each other on an arms length basis, as required by § 272(b)(5), or had adequately disclosed their transactions, as required by § 272(b)(5), or had met the nondiscrimination obligations required by § 272(c), or had met the joint marketing requirements imposed by § 272(g).⁴⁴⁶

Qwest's application is silent on the violations identified by the Minnesota ALJ, and instead relies, fundamentally, on "paper promises" that it will comply with the requirements of § 272. Qwest thus cannot be found to have met its burden of establishing § 272 compliance, which provides an "independent ground[] for denying [this] application."⁴⁴⁷

⁴⁴⁶ In the Matter of a Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272), Minnesota Pub. Util. Comm., Findings of Fact and Conclusions of Law and Recommendations, PUC Doc. No. P-421/C1-01-1372 (Mar. 14, 2002) (hereinafter "Minnesota ALJ Findings"). The Minnesota Commission has not yet rule upon the Minnesota ALJ's findings and recommendations. Although Qwest's current application does not include Minnesota, the issues raised in evaluating section 272 compliance are unaffected by state by state differences, as the Commission previously has recognized. *E.g.* Verizon Pennsylvania Order, ¶ 124 (finding section 272 compliance based on compliance established in Verizon earlier applications from different states).

⁴⁴⁷ *New York 271_Order*, ¶ 402. Qwest also has not addressed the findings of the Washington Administrative Law Judge, who found in November last year that Qwest was not in compliance with Section 272 (citing, among other things, Qwest's failure to satisfy the Commission's affiliate transaction rules and transaction posting requirements). *See In the Matter of the Investigation Into US WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket Nos. UT-003022 & 003040, Washington Utilities and Transportation Commission, *Twentieth Supplemental Order (Workshop Four): Checklist Item No. 4; Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272*, pp. 114-116 (November 14, 2001). To be sure, the Washington Commission, relying in large part on a review conducted by KPMG, rejected the Washington ALJ's conclusions. But its reliance, like Qwest's reliance in this application, on the KPMG review to establish section 272 compliance is misplaced. *See, e.g.*, Schwartz Decl. ¶¶ 24-27. First, as Qwest acknowledges, the KPMG review concerns only its alleged compliance with sections 272(b)(2), 272(b)(5), and 272(c)(2), and thus is irrelevant to showing of noncompliance under sections 272(b)(1), 272(b)(3), 272(c)(1), and 272(g). *See* Schwartz Decl. ¶ 24. Moreover, KPMG's report (which concerned the period from April 1, 2001 to August 31, 2001) found that was *noncompliant* with sections 272(b)(2), 272(b)(5), and 272(c)(2), citing four instances when Qwest did not comply with the affiliate transaction pricing rules, and eight instances when the Company did not process accounting entries and affiliate billings and did not reduce to writing certain services provided between Qwest and the affiliate. *See* Schwartz Decl. ¶ 24 and Exh. MES-272-3. Although Qwest characterizes these errors as minor and says they have been corrected, *see* Schwartz Decl. ¶¶ 25-27, such previous findings of noncompliance, coupled with fact that no similar review was conducted by KPMG in advance of Qwest's current application, renders the old KPMG report of limited relevance to Qwest's claim of section 272 compliance.

A. Qwest And QCC Have Not Established That They “Operate Independently” As Required By Section 272(b)(1).

Section 272(b)(1) requires that a BOC and its long distance affiliate “operate independently,” meaning, among other things, that the BOC and section 272 affiliate may not jointly own switching and transmission facilities or perform operation, installation, or maintenance (“OIM”) services on each other’s facilities.⁴⁴⁸ The Minnesota ALJ held that Qwest and QCC had not established compliance with these requirements, and nothing new has been presented to this Commission to justify changing this conclusion.⁴⁴⁹

Like here, Qwest’s affiants before the Minnesota ALJ promised that Qwest and QCC would not jointly own switching and transmission facilities.⁴⁵⁰ The ALJ held that such bare promises did not meet Qwest’s burden, however, noting that Qwest had “not presented documentary evidence that supports its assertion,” and had not provided any “description of Qwest’s asset deployment plan within its network strategy.”⁴⁵¹ So too here, Qwest presents simple pledges to follow the law, without substantiating such claims with tangible evidence or a broader description of its network ownership plans.⁴⁵² Absent any further evidence or elaboration (for example, do Qwest and QCC intend to utilize any network facilities of Qwest affiliates, and, if so, do they agree that section 272(b)(1) bars their joint use of such facilities?), Qwest cannot be said to have established compliance with the “operate independently” requirement.

Similarly, Qwest and QCC promise, again without evidence or elaboration, that they will not provide OIM services for each other’s facilities.⁴⁵³ No detail is provided as to how such OIM services will in fact be provided in order to substantiate their claims.⁴⁵⁴

⁴⁴⁸ See Non-Accounting Safeguards Order ¶ 163; Non-Accounting Safeguards Third Order on Reconsideration ¶ 20.

⁴⁴⁹ See Minnesota ALJ Findings, ¶¶ 25-31; *see also* Selwyn Minnesota Aff. ¶¶ 27-30.; L. Selwyn submitted an affidavit before the Minnesota ALJ on section 272 issues on behalf of the Minnesota Department of Commerce (hereinafter “Selwyn Minnesota Aff.”).

⁴⁵⁰ See Minnesota ALJ Findings, ¶ 26.

⁴⁵¹ *Id.*, ¶ 29.

⁴⁵² See Schwartz Decl., ¶¶ 38-41; Brunsting Decl., ¶¶ 27-28.

⁴⁵³ Schwartz Decl. ¶ 41; Brunsting Decl., ¶ 27.

⁴⁵⁴ See Brunsting Decl., ¶ 27(c) & (d)).

Like the Minnesota ALJ, the Commission should call on Qwest to present tangible evidence to establish compliance with section 272(b)(1), not just promises.

B. Qwest Has Not Established Compliance With The Separate-Employees Requirement Of Section 272(b)(3).

Under section 272(b)(3), a BOC and its section 272 affiliate must have “separate officers, directors, and employees.” This requirement is intended to ensure, among other things, that the BOC and section 272 affiliate are truly separate operating entities with “independent management and control of the two entities.”⁴⁵⁵

Qwest cannot meet its burden under section 272(b)(3), as it asserts, simply by submitting lists of its current officers and directors and declaring that the payrolls for Qwest and QCC contain no overlapping names.⁴⁵⁶ For example, a BOC-paid employee and affiliate-paid employee reporting to the same supervisor could not properly be deemed “separate,” especially if they work day-to-day alongside one another. Similarly, a section 272 affiliate’s board cannot be deemed separate if it is comprised entirely (as here) of officers of the BOC parent.

The Minnesota ALJ, after an exhaustive review of evidence before him,⁴⁵⁷ concluded that Qwest had not established compliance with section 272(b)(3), finding:

The arrangement of officers and directors created by Qwest goes beyond the common reporting of officers to a single superior outside of the particular corporate entity. The directors and officers of both the Qwest BOC and QCC are integrated within each company and the officers and directors of each company are integrated into the corporate structure of the common parent. Some of these same individuals have provided management between the Qwest BOC and its 272 Affiliate by contract. This structure defeats the purpose of the separate officers and directors requirement.⁴⁵⁸

⁴⁵⁵ *Michigan 271 Order*, ¶ 360.

⁴⁵⁶ *See* Schwartz Decl. ¶ 52. Even on this narrow fact issue Qwest’s application is deficient, as the information presented on employee payrolls for Qwest and QCC concerns a single review that was conducted over a year ago, in March 2001. *Id.* ¶ 53.

⁴⁵⁷ *See* Minnesota ALJ Findings ¶¶ 39-61.

⁴⁵⁸ Minnesota ALJ Findings ¶ 60; *accord* Selwyn Minnesota Aff. ¶¶ 51-59. *See also* Skluzak Minnesota Aff. ¶¶ 45-54. The Minnesota ALJ’s approach and findings are strongly supported by the review mandated by the Biennial Audit Procedures, which require an independent auditor to gather employee-specific information on each employee transferred between the BOC and section 272 affiliate, including their use and access to confidential information from their prior employer. *See* Skluzak Minnesota Aff. ¶ 47; Biennial Audit Procedures, Objective III, Procedure 5.

Nothing in Qwest's submission here undermines this finding. Indeed, Qwest's submission raises still more questions that Qwest does not even attempt to answer. For example, Qwest acknowledges that employees of the BOC and section 272 affiliate maintain offices on the same floor of the same buildings, without attempting to show that this close physical proximity is reasonable and appropriate under section 272(b)(3).⁴⁵⁹ Similarly, Qwest acknowledges that a large number of employees ("fewer than 200") were transferred between the BOC and section 272 affiliate "during the 272 transition period," without any further explanation as to who these employees are, what positions they held, or otherwise identifying any agreements between the BOC and affiliate concerning their transfer.⁴⁶⁰ More needs to be known about such employee transfers before a finding of compliance with section 272(b)(3) can be made, because, as the Minnesota ALJ found, [t]here is legitimate concern over employee transfers as a means of evading the separate employee requirement." Minnesota ALJ Findings, ¶ 54. Finally, Qwest recites no policy and presents no evidence concerning the structure of employee reporting and supervision. Qwest cannot maintain an integrated workforce of BOC and section 272 affiliate employees, with Qwest employees reporting to BOC supervisors and BOC employees reporting to Qwest supervisors, and claim "separation" under section 272(b)(3) through the simple expedient of maintaining separate payrolls, publishing generic service-agreements, and using employer-identifying nametags.

On this record, Qwest has not established compliance with section 272(b)(3).

C. Qwest Does Not Meet The Requirement Under Section 272(b)(5) That All Transactions With the Section 272 Affiliate Be At Arm's Length, Reduced To Writing, And Publicly Available.

Section 272(b)(5) requires that "all transactions" between Qwest and its section 272 affiliate be "on an arm's length basis with any such transactions reduced to writing and available for public

⁴⁵⁹ See Schwartz Decl. ¶ 54(2).

⁴⁶⁰ See Schwartz Decl., ¶ 55.

inspection.” Qwest is not currently in compliance with these requirements, and does not show that it will be in compliance if interLATA authority is granted.⁴⁶¹

First, as the Minnesota ALJ found, the transactions between Qwest and QCC cannot be deemed at “arm’s length” because both entities depend on their joint parent, QSC, to provide legal, public policy, and financial services for these transactions. Minnesota ALJ Findings, ¶¶ 78-80. As the ALJ reasoned: “Entities dealing with each other cannot depend upon the same source for legal services, public policy analysis, and financial consulting with respect to transactions occurring between the two entities and remain at “arm’s length” in a transaction.” *Id.* ¶ 79. Qwest presents no evidence in its application to dispute this finding, or to explain how this transaction structure can be deemed consistent with their arm’s-length transactions obligations.⁴⁶² The simple fact that a BOC and affiliate properly may share certain services,⁴⁶³ does not mean they may utilize the same core personnel “negotiating” on both sides of a transaction and still have that transaction deemed to be at “arms length.”

Second, although acknowledging that a significant number of employees have been transferred between Qwest and QCC, *e.g.* Schwartz Decl. ¶ 55, no evidence appears in Qwest’s application (or on its Internet site) to suggest that the agreements to transfer such employees ever were reduced to writing or that these employee transfers were conducted on an arm’s length basis. Plainly, Qwest and QCC cannot engage in coordinated, planned employee transfers without meeting each of the section 272(b)(5) requirements. Such employee exchanges are of special concern because of the “built-in” value offered by employees with substantial specialized training and confidential

⁴⁶¹ See Minnesota ALJ Findings, ¶¶ 74-101; Selwyn Minnesota Aff., ¶¶ 38-50; Skluzak Minnesota Aff., ¶¶ 55-121.

⁴⁶² Moreover, as the Minnesota ALJ points out, the failure to engage in arm’s-length transactions can seriously damage competition, because, for example, transaction pricing for a BOC and section 272 affiliate ultimately has a net zero effect on the financial returns to their joint owner, but has a serious impact on competing carriers because of the section 272(c) obligation to offer the same terms to competitors. See Minnesota ALJ Findings, ¶¶ 83-84.

⁴⁶³ See *Non-Accounting Safeguards Order*, ¶¶ 178-83.

information.⁴⁶⁴ Qwest has not established that it ever intends to comply with section 272(b)(5) concerning such employee transfers, let alone establish that it is currently in compliance.

Finally, Qwest has on numerous past occasions failed properly to reduce covered transactions to writing and make them publicly available.⁴⁶⁵ Qwest acknowledges many of these past errors, but promises that the circumstances that led to these problems have since been corrected.⁴⁶⁶ Yet the Minnesota ALJ has cited numerous current instances where Qwest has failed to meet its reporting obligations under section 272(b)(5).⁴⁶⁷ At the very least, given Qwest's admitted past noncompliance and the Minnesota ALJ's findings of current noncompliance, Qwest must be compelled to submit substantial detailed evidence of its compliance with section 272(b)(5). Qwest has not come close to making such a showing in its current application, which devotes little time or effort to establishing section 272(b)(5) compliance and ignores the ALJ's findings.⁴⁶⁸

D. Qwest Has Not Demonstrated Compliance With Its Nondiscrimination Obligations Under Section 272(c).

Section 272(c)(1) "requires that a BOC in its dealings with its section 272 affiliate 'may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.'"⁴⁶⁹ Qwest has not demonstrated compliance with this nondiscrimination requirement.

First, as the Minnesota ALJ found, Qwest has not established that the exchange of confidential information between Qwest and QCC complies with this nondiscrimination requirement.⁴⁷⁰ Qwest claims that the use of confidential information by employees transferred between Qwest and QCC is prohibited, and suggests that access to such confidential information is

⁴⁶⁴ In recognition of the value of such employee transfers, the "California PUC adopted a 25% 'employee transfer fee' to be applied against the annual salary of any Pacific Bell employee that is transferred to an affiliate." Selwyn Minnesota Aff. ¶ 51 (citing California Public Utilities Commission, D.87-12-067, 27 CPUC2d 1, 136).

⁴⁶⁵ See Skluzak Minnesota Aff. ¶ 58-59, 97, 100.

⁴⁶⁶ See Schwartz Dec. ¶¶ 19-20, 48.

⁴⁶⁷ See Minnesota ALJ Findings, ¶¶ 94-101.

⁴⁶⁸ Cf. *Second Louisiana 271 Order* ¶ 335 (BOC must "provide adequate assurances or demonstrate that it makes publicly available all transactions ... as required by section 272(b)(5) and the Commission's rules.").

⁴⁶⁹ *Second Louisiana 271 Order* ¶ 341 (quoting § 272(c)(1)).

just as restrictive for employees of Qwest or QCC as it is for employees of a competing carrier.⁴⁷¹ But Qwest ignores the fact that substantial confidential information is shared with, and inevitably used by, Qwest affiliates that provide substantial joint services for both Qwest and QCC. Qwest describes no restriction on the availability of such Qwest or QCC confidential information indirectly through affiliate personnel who provide services to both Qwest and QCC.⁴⁷² Indeed, Qwest does not even acknowledge a legal obligation to preclude such indirect use of confidential information. Qwest cannot meet its burden of proof regarding section 272(c) on this record.

Second, Qwest acknowledges that it provides a mechanism for its section 272 affiliate to request a new product, service, or information from Qwest,⁴⁷³ but describes no similar mechanism being available to competing carriers. Thus, a procedure is in place for QCC to request new products and services, but other IXC's have no similar avenue for requesting new products or services, and instead must wait for Qwest to decide to provide a product or service to QCC before they also would be made available to AT&T. This procedure is discriminatory on its face, in violation of section 272(c).

Third, again as found by the Minnesota ALJ, the evidence presented in that proceeding showed that Qwest failed "to charge late payment fees to the 272 Affiliate in the same manner as late fees are charged to other IXC's," and thus constituted a violation of section 272(c)'s nondiscrimination requirements.⁴⁷⁴ Qwest's application here does not respond to this issue. Instead, Qwest vaguely notes its right to charge QCC for late payments, and notes that "interest charges have been recorded," without submitting evidence that such late payments were collected (or, in the alternative, that late payments were similarly not collected from competing IXC's).⁴⁷⁵

⁴⁷⁰ Minnesota ALJ Findings, ¶¶ 105-06.

⁴⁷¹ See Schwartz Decl. ¶ 56; Brunsting Decl. ¶ 30(f).

⁴⁷² See Minnesota ALJ Findings, ¶ 106.

⁴⁷³ See Schwartz Decl., ¶ 78 & MES-272-13.

⁴⁷⁴ Minnesota ALJ Findings, ¶¶ 72-73, 108.

⁴⁷⁵ See Schwartz Decl., ¶ 19; Brunsting Decl., ¶ 41.

Finally, because of the lack of information provided by Qwest concerning its joint marketing work on behalf QCC concerning “planning” services, no finding can be made that the joint marketing efforts (admittedly not made available to competing IXC’s) are exempted from compliance with section 272(c).⁴⁷⁶

Qwest thus has not established compliance with section 272(c).

E. Qwest Has Not Presented Any Evidence To Establish Compliance With The Joint Marketing Restrictions Of Section 272(g).

Qwest presents no evidence to establish compliance with its marketing obligations under section 272(g). Instead, Qwest simply parrots the requirements of the statute, and promises compliance. Such a total absence of evidence cannot meet Qwest’s burden of proof, especially in light of the fact that the Minnesota ALJ specifically found Qwest had not established compliance with section 272(g).⁴⁷⁷

For example, section 272(g)(1) bars a section 272 affiliate from marketing or selling the BOC’s telephone exchange services “unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.” As “proof” of compliance, Qwest simply states that “QCC will not” engage in such marketing or selling, Brunsting Decl., ¶ 49; *see* Schwartz Decl., ¶ 94, without either (i) affirmatively stating whether QCC currently does or does not sell and market Qwest’s services, or (ii) if it does currently market such services, identifying the relevant applicable “arms length” agreements and showing that other outside companies have the same opportunities. Qwest makes no attempt to answer these questions, and thus cannot be found to satisfy section 272(g)(1).

Similarly, although Qwest makes clear its intention jointly to market QCC’s services if its application is approved, *e.g.*, Schwartz Decl., ¶ 96, and the Minnesota ALJ noted that Qwest had then

⁴⁷⁶ Minnesota ALJ Findings, ¶¶ 108, 117.

⁴⁷⁷ *See* Minnesota ALJ Findings, ¶¶ 109-131; *see also* Skulzak Minnesota Aff. ¶¶ 150-159.

already billed QCC over \$500,000 for joint-marketing “planning” services,⁴⁷⁸ Qwest presents no evidence to show that the planned joint marketing will be conducted in compliance with section 272(g) and the *Non-Accounting Safeguards Order*.

For example, Qwest simply acknowledges, without any elaboration or evidence, its obligation under section 251(g) to satisfy equal access requirements in any marketing efforts.⁴⁷⁹ Although the Commission has found that a BOC need not submit proposed marketing scripts in order to show compliance with section 272(g), *South Carolina 271 Order*, ¶ 236, it has never suggested that an applicant need present no evidence other than paper promises to show compliance with section 272(g)’s joint marketing requirements. Such evidence, if it exists, should be readily available to Qwest and not difficult to compile and present. For example, training materials concerning such joint marketing efforts could be submitted. If no written training materials are available, then Qwest could submit a description of what training was provided, to whom, and over what period of time.⁴⁸⁰

Finally, Qwest and QCC, although they appear already to have engaged in substantial planning and preparation for joint marketing of QCC’s services, provide no evidence of what has been entailed in such work in order to show that it has been (and will be) consistent with the requirement that such “joint marketing” not include “BOC participation in the planning, design, and development of a section 272 affiliate’s offerings.”⁴⁸¹ Again, Qwest’s simple pledge that it will not participate in such conduct is insufficient, especially in light of the broadly worded joint marketing agreement between it and QCC⁴⁸² and the fact that Qwest just last summer indisputably engaged in

⁴⁷⁸ See Minnesota ALJ Findings, ¶ 116.

⁴⁷⁹ See *Non-Accounting Safeguards Order*, ¶ 292; Schwartz Decl. ¶ 97.

⁴⁸⁰ AT&T describes such training materials and information as examples only, and does not intend to suggest that such materials could alone satisfy a BOC’s burden in this area. Moreover, the minimal training materials that were submitted by Qwest are woefully inadequate to establish that Qwest will satisfy the section 272(g). These materials include only a one-paragraph summary description of the joint marketing provisions, and do not even mention the equal access obligations. See Brunsting Decl. Exhibit JLB15 272

⁴⁸¹ *Non-Accounting Safeguards Order*, ¶ 296.

⁴⁸² The Minnesota ALJ noted that, in the then-existing joint marketing agreement, Qwest committed to help with, among other things, “planning sales and promotion functions,” but no Qwest witness was able to describe what was involved in the “planning functions.” Minnesota ALJ Findings, ¶¶ 113-115.

illegal marketing of QCC's services, only later to explain it "occurred under a mistaken interpretation of the application of the Act."⁴⁸³

On this record, no finding can be made that Qwest has and will meet the marketing requirements of section 272(g).

In sum, Qwest and its section 272 affiliate have not met their burden of showing that they will operate in accordance with section 272 if granted in-region interLATA authority. This application may be rejected on that basis alone.

VI. QWEST'S PROVISION OF INTERLATA SERVICE IN MONTANA, UTAH, WASHINGTON AND WYOMING IS NOT IN THE PUBLIC INTEREST.

Even if the Commission could find that Qwest had fully implemented its obligations under the competitive checklist, the record here precludes any finding that granting Qwest's application for Section 271 authority in Montana, Utah, Washington and Wyoming is consistent with the public interest. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully and irreversibly open to competition. Because the Commission cannot make this determination in these four states, a grant of section 271 authority is premature and wholly at odds with the fundamental premise of the Act.

A. InterLATA Authorization Is Not In The Public Interest Unless The BOC's Local Markets Are Irreversibly Open To Competition.

In Qwest's view, the Commission should virtually presume that the public interest will be served by granting Qwest's application because such approval will spur competitors to enter the local market. Moreover, according to Qwest, the Commission should ignore any and all of Qwest's anticompetitive actions, whether past or present. According to Qwest, past wrongdoing that has been adjudicated against Qwest has already been "resolved" and should not be considered again;

⁴⁸³ Minnesota ALJ Findings, ¶ 125. Specifically, in July 2001, Qwest ran advertisements in Minnesota newspapers promoting the QCC's performance in consumer satisfaction survey, and the Minnesota ALJ found that "the advertisements and scripts used by Qwest demonstrate that Qwest was engaged in joint marketing activity of the Qwest BOC and its 272 Affiliate prior to Qwest's entry into the interLATA market." Minnesota ALJ Findings, ¶ 123; *see also* Skluzak Minnesota Aff. ¶ 156.

allegations that such anticompetitive actions continue are merely unadjudicated allegations and should not be considered until they are resolved.⁴⁸⁴ Qwest's presumptive benefit of "spurring" local entry through the grant of interLATA authority, and its plea that the Commission turn a blind eye to *all* anticompetitive conduct (that adjudicated in the past or allegations pending currently), would conflict directly with the plain language of the statute and Commission precedent, which put the burden squarely on the applicant to show that its entry would be "consistent with the public interest." The Commission therefore has flatly rejected the argument that the public interest test can be satisfied by simply presuming to show that the benefits of entry into long distance will outweigh competitive harms from premature authorization.⁴⁸⁵

In fact, the absence of any meaningful local competition is itself a compelling reason to reject an application as inconsistent with the public interest.⁴⁸⁶ The lesson from the Commission's experience is clear: allowing an incumbent LEC to provide interLATA services before local markets are open will not spur successful local competition.⁴⁸⁷ If CLECs cannot profitably offer local residential service to customers, they cannot and will not effectively compete in local markets, regardless of whether the incumbent has obtained long-distance authorization.⁴⁸⁸

⁴⁸⁴ Qwest Reply, July 29, 2002, at 125-127.

⁴⁸⁵ See *Michigan 271 Order* ¶ 43 ("Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied"); ¶ 388 ("As we have previously observed, 'the entry of the BOC interLATA affiliates into the provision of interLATA services has the potential to increase price competition and lead to innovative new services and marketing efficiencies.' Section 271, however, embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.")

⁴⁸⁶ See *Sprint v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

⁴⁸⁷ Although Qwest boasts (Br. at 177-79) of competition currently being provided by New York and Texas CLECs, the January 2001 *TPUC Report* on the "Scope of Competition in Telecommunications Markets of Texas" reveals that "monopoly power exists . . . in residential and rural markets in Texas" (*id.* at 83; *see* xiii) and severe financial problems have caused both large and small CLECs to reduce or eliminate their residential service in Texas (*id.* at 55-58, 80-81). The Report also reveals that the lack of competition has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and to *raise* its prices for local services to both residential and business customers. *Id.* at x, 62-64, 79, 81). In sum, the TPUC concludes: "By the end of 2000, SWBT's financial position had strengthened relative to the CLECs. *SWBT's entry into the long distance market has weakened the ability of CLECs to challenge SWBT in local voice service.* *Id.* at 81 (emphasis added).

⁴⁸⁸ Emboldened by its ability to market bundles of local and long distance services without any competition, in February, 2001, SWBT *raised* its residential long distance rates in Texas by 10 to 33 percent, *increased* its basic rates for long-

Accordingly, as the Commission has recognized, granting Qwest's request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open and will remain so."⁴⁸⁹ As the Commission has likewise recognized, no such finding is possible if the "BOC has engaged in discriminatory or other anticompetitive conduct, or failed to comply with State and federal telecommunications regulations," because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations."⁴⁹⁰ While the Commission has stated that it "will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it has indicated that it will take such action where, as here, "a pattern of discriminatory conduct" exists that undermines its confidence that the relevant "local market is open and will remain so" after the grant of Section 271 authority.⁴⁹¹ No time and case has better invoked the Commission's conviction that it will withhold section 271 authority in the presence of a pattern of discriminatory conduct than Qwest's conduct: Qwest has a tradition of violations and anticompetitive conduct that has been adjudicated and remains unabated to this day.

B. Qwest Has Engaged In A Pattern Of Anticompetitive Acts And Violations Of Sections 251, 252 and 271 Of The Act To Maintain And Expand Its Market Power Over Local Service.

Qwest has failed "to cooperate in opening its network to competitors" and instead has engaged in a pattern of "discriminatory and other anticompetitive conduct" that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Over the past five years, Qwest (and its predecessor US WEST)

distance service by more than 10 percent, and *also increased* the "discounted rate" for customers who buy other services from SWBT by 33 percent. "SWBT Raises Nonlocal Call Rates: Company Says Prices Better Reflect Costs," *The Dallas Morning News*, February 2, 2001.

⁴⁸⁹ See *SBC Texas 271 Order* ¶ 431.

⁴⁹⁰ *Michigan 271 Order* ¶ 397.

⁴⁹¹ See *Michigan 271 Order* ¶¶ 391, 397; *SBC Texas 271 Order* ¶ 431; *York 271 Order* ¶ 431, 444.

have undertaken a pervasive effort to forestall competition in its local exchange markets at the same time that it launched its efforts to provide service across LATA boundaries.

1. Qwest's Violations of Section 252 (Secret Interconnection Deals).

As demonstrated above, Qwest has undertaken a deliberate, region-wide scheme to violate its nondiscrimination obligations under the Act by violating Section 252 and conferring secret, favorable interconnection “deals” on selected CLECs. In some of these arrangements, Qwest has silenced its CLEC competitors, securing their acquiescence to a prohibition on their participation in the proceedings evaluating Qwest’s compliance with its requirements under Section 271. Qwest concealed these interconnection agreements from the state commissions, rather than file them as the Act requires, to prevent other CLECs (and the state commissions) from becoming aware of the favorable interconnection terms and conditions that were not being made available to other CLECs.

This pervasive anticompetitive practice, apparently impacting CLECs in all of Qwest’s states, has now been the subject of actions by several independent state authorities, including Iowa, Arizona and Minnesota. The Iowa Utilities Board found that Qwest had violated section 252 of the Act and section 38.7(4) of the Iowa Code by failing to file three interconnection agreements in a timely manner.⁴⁹² The Board ordered Qwest to identify and file any other interconnection agreements that are effective within Iowa, providing sixty days for compliance with this mandate.⁴⁹³ The staff of the Arizona Corporation Commission (“ACC”) confirmed the obviousness and seriousness of Qwest’s section 252 violations and anticompetitive conduct in a report released on June 7, 2002, which recommended that Qwest be required to file 25 secret agreements.⁴⁹⁴ The staff has also recommended a significant assessment of fines for the failure to file these agreements, and explicitly recommended a higher forfeiture for seven agreements that “contained clauses *prohibiting* the carrier or CLEC from participating in a state regulatory proceeding” because of “the more egregious nature

⁴⁹² *AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2, May 29, 2002, at 16 (Attachment 3 hereto).

⁴⁹³ *Id.* at 17; *see supra* at 21-23 (discussing Iowa findings of Section 252 violation and discrimination).

of the infraction.”⁴⁹⁵ Qwest’s unlawful conduct also is under investigation in other states, including Washington, New Mexico and Minnesota, where the Minnesota Department of Commerce is seeking to have millions of dollars of sanctions imposed against Qwest.⁴⁹⁶

AT&T demonstrated above that Qwest’s secret, discriminatory agreements preclude any reasoned finding that Qwest satisfies the competitive checklist. These agreements also preclude a finding that Qwest’s application is in the public interest for two independent reasons. First, Qwest’s practice of entering into and concealing these interconnection arrangements violates section 252 of the Act, and directly impairs the development of a competitive local exchange market. Qwest’s discriminatory provision of interconnection and network elements on preferential terms to some CLECs but not others has a direct and obvious inhibiting impact on the development of a competitive local exchange market. Qwest’s deliberate concealment of these agreements from state regulators and CLECs then exacerbated this problem because regulators could not take action against these discriminatory agreements and potential entrants were unaware of the availability of terms and conditions offered to their competitors.

Second, provisions in several of these secret agreements prohibit the participation of necessary parties in the proceedings concerning Qwest’s application for section 271 authority and therefore raise serious public interest concerns. As the ACC staff concluded, “agreements which attempt to suppress participation by all parties for full development of the record in regulatory proceedings before the Commission are not in the public interest.”⁴⁹⁷ As the ACC Staff correctly recognized, the critical role of state commission section 271 proceedings is wholly undermined if the efficacy of these proceedings is cast into doubt. Similarly, the Commission’s section 271 approval

⁴⁹⁴ *Staff Report And Recommendation In The Matter Of Qwest Corporation’s Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 17-18 (Attachment 4 hereto).

⁴⁹⁵ *Id.* at 18-19 (emphasis in original); *see supra* at 24-25 (discussing findings in Arizona).

⁴⁹⁶ *See supra* at 19-20 (discussing Minnesota proceeding, discriminatory concealment of preferential treatment on rights of way and other terms).

⁴⁹⁷ Arizona Report at 1; *see also id.* at 16 (“[P]rovisions in agreements which gave favored treatment in exchange for a party’s agreement not to participate in proceedings before this Commission . . . are of extreme concern to the Commission and detrimental to the public interest”).

process is a meaningless exercise if parties with relevant information are silenced or excluded. Granting Qwest's application in the face of these grave concerns about the fundamental integrity of the approval process cannot be in the public interest.

2. Qwest's Violation of Section 251 (Refusal To Test UNE-P Services).

At the same time that Qwest has concealed discriminatory interconnection arrangements and purchased CLEC silence in state section 271 proceedings, it has engaged in unlawful efforts to avoid its interconnection obligations, with at least one of these derelictions resulting in an adverse finding by a state commission. On April 9, 2002, the full Commission of the Minnesota PUC concurred with the findings of an Administrative Law Judge ("ALJ") that Qwest had engaged in anti-competitive behavior, violating its interconnection agreement with AT&T and violating state and federal law. Qwest's actions demonstrate that it has no intention to cooperate with CLECs in testing and implementing competitive service offerings.

The facts of the adjudicated refusal of Qwest to provide required services are simple and quite telling.⁴⁹⁸ AT&T informed Qwest that it intended to test UNE-P ordering and provisioning in Minneapolis ("Test Trial"). Despite months of meetings between the parties, Qwest at the eleventh hour flatly refused to conduct the Test Trial. Consequently, AT&T filed a complaint with the MPUC.⁴⁹⁹ In addressing the AT&T's complaint on its merits, the ALJ concluded that Qwest committed a knowing, intentional, and material violation of its obligation to engage in cooperative testing under the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000, to May 11, 2001. In his decision, the ALJ emphasized that Qwest's violations were knowing and intentional and constituted "a continuing pattern of conduct."⁵⁰⁰ The ALJ also

⁴⁹⁸ The recommended decision of Administrative Law Judge Mihalchick, for the Minnesota Public Utilities Commission, February 22, 2002, is Attachment 11 hereto. The recommended decision contains a detailed discussion of the facts of the case.

⁴⁹⁹ On April 30, 2001, the Minnesota PUC issued an Order granting AT&T temporary relief requiring Qwest to complete certification and bill-conductivity testing. *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against Qwest Corporation*, Docket No. P-421/C-01-391, Order Granting Temporary Relief and Notice and Order for Hearing, issued April 30, 2001 (Attachment 12 hereto).

⁵⁰⁰ *See id.* at 34.

found that Qwest deliberately fabricated evidence in an attempt to assert that AT&T did not intend to enter the local exchange market in Minnesota.⁵⁰¹ These findings of the ALJ, left undisturbed by the full Commission, not only demonstrate an on-going pattern of anticompetitive behavior on the part of Qwest, but also show a willingness and ability on Qwest's part to violate Section 251, to prevaricate and to subvert the ability of a regulatory body to ensure that it will live up to its obligations in a competitive environment.

Qwest's action in Minnesota is not an isolated event, but is consistent with its behavior in other states as well, including Washington. In Washington, Qwest denied AT&T access to inside wiring in multiple dwelling units ("MDUs), and in response to a complaint filed by AT&T, the WUTC, on April 9, 2001, ordered Qwest to promptly provide AT&T with access.⁵⁰² Qwest had ripped out wires and conduit lawfully and properly installed by AT&T in various building access terminals located at the network interface device/minimum point of entry ("MPOE") terminals. Furthermore, Qwest had padlocked boxes containing NID and other wiring, refused to negotiate access terms with AT&T and called the police when AT&T attempted to install its own wiring. Additionally, Qwest had demanded non-viable, cost-prohibitive and commercially coercive methods for AT&T to obtain access to wiring inside the MDUs, such as insisting that such access required truck rolls by Qwest and that AT&T would have to reimburse Qwest its costs for each such truck roll. Such actions by Qwest in Washington made it virtually impossible for AT&T to provide local residential service to customers located in MDUs.

And AT&T is not alone in experiencing Qwest's hostility to local competition in Washington. In a ruling issued February 10, 1999, the WUTC also found that Qwest-U S WEST had violated state laws and terms of its interconnection agreement by delaying MCI Metro from providing local phone

⁵⁰¹ See *id.* at 30-33; Minn. Stat. §237.121(a)(1).

⁵⁰² *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation*, Docket No. UT-003120, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion for Summary Determination, issued April 9, 2001.

service.⁵⁰³ In assessing Qwest/US WEST's actions in this case three years ago, at least one WUTC Commissioner recognized the pattern AT&T displays for Qwest today: "This is a consistent pattern of behaviors that all operated to U S WEST's advantage, gave it undue preferences, and subjected MCI to an undue competitive disadvantage and improper discrimination."⁵⁰⁴

3. Qwest's Pervasive Violations of Section 271.

Qwest also clearly has engaged in a deliberate pattern and campaign of evading section 271, both before and after conditions were imposed on Qwest as part of its merger with U S WEST. The Commission has on three occasions adjudicated Qwest, and U S WEST before it, responsible for violating section 271. Qwest's penchant for prematurely entering the market for the provision of InterLATA services has not abated, because violations continue to this day.

Three FCC Adjudicated Violations. In at least three instances, Qwest and its predecessor U S WEST entered the interLATA long distance market in violation of section 271. First, the Commission addressed U S WEST's "teaming" arrangement with pre-merger Qwest and held that it violated section 271.⁵⁰⁵ Under the "teaming" arrangement, U S WEST (and Ameritech) provided their local customers with a one-stop shopping opportunity that included interLATA services in violation of section 271.⁵⁰⁶ Specifically, under the arrangement between U S WEST and Qwest, the incumbent local exchange carrier, among other things, (1) designed and developed a package of services that included long distance service, (2) selected and recommended Qwest as the long distance provider for the offering, (3) established and prospectively controlled the price, terms and conditions of the long distance offering, (4) served as the customer point of contact for the offering,

⁵⁰³ *MCIMetro Access Transmission, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-971063, Commission Decision and Final Order (Feb. 10, 1999). The WUTC found that U S WEST's practices imposed undue disadvantages on MCIMetro and granted unreasonable preferences to itself.

⁵⁰⁴ Chairwoman Anne Levinson agreed with the majority opinion and also favored imposing substantial penalties against US WEST.

⁵⁰⁵ *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation*, Memorandum Opinion And Order, 13 FCC Rcd 21438 (1998) ("Qwest Teaming Order") ¶ 52.

⁵⁰⁶ *Id.* ¶¶ 1, 52.

and (5) marketed the offering under their brand.⁵⁰⁷ In the face of these facts, the Commission concluded that:

the business arrangements with Qwest permit Ameritech and U S WEST to provide in-region, interLATA services, prior to section 271 authorization. It is clear on this record that Ameritech's and U S WEST's business arrangements with Qwest pose the competitive concerns that section 271 seeks to address, and we accordingly find them unlawful under the Act.⁵⁰⁸

In the second proceeding, the Commission held that U S WEST's "provision of nonlocal directory assistance service to its in-region subscribers" constituted "the provision of in-region, interLATA service as defined in section 271(a) of the Act."⁵⁰⁹ As the Commission recognized, the "nationwide component of U S WEST's nonlocal directory assistance service" was "unlawful" as it had been configured.⁵¹⁰ Once again, Qwest provided in-region, interLATA service without first demonstrating that its local markets were open to competition, without Commission approval, and in violation of Section 271.

Third, in February 2001, the Commission held that U S WEST's provision of a calling card platform that permitted its local subscribers to place long distance calls originating inside or outside of its local service area violated Section 271.⁵¹¹ In finding that U S WEST intended to provide in-region, interLATA service, the Commission found that:

U S WEST's participation in the long distance market through its 1-800-4USWEST Service enables it to obtain significant competitive advantages that are similar to what the *Qwest Teaming Order* found to be objectionable and almost identical to what the *1-800-AMERITECH Order* found to be objectionable. The Service allows U S West to build

⁵⁰⁷ *Id.* ¶ 1.

⁵⁰⁸ *Id.* ¶¶ 44, 52. The Commission noted that with the local market not yet open to competition, the results of offering local customers one-stop shopping were astoundingly anticompetitive. By leveraging its dominance in the local market to gain long distance customers, U S WEST persuaded 130,000 of its local customers to purchase Qwest's long distance service in just four weeks of marketing the unlawful one-stop shopping program.

⁵⁰⁹ *See Petitions of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; U S WEST Communications, Inc. for Forbearance*, Memorandum Opinion and Order, 14 FCC Rcd 16252 (1999) ("NDA Order") ¶¶ 2, 63.

⁵¹⁰ *Id.* ¶ 63.

⁵¹¹ *AT&T Corporation v. U S WEST Communications, Inc.; MCI Telecommunications Corporation, Inc. v. U S WEST Communications, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 3574 (2001) ¶ 30.

goodwill with its local-service customers, depicting itself as a full-service provider prior to receiving section 271 approval. Indeed, the full-service, or one-stop shopping, advantages provided by the Service appear to have been U S WEST's primary objective in implementing the Service in the first place. As the Commission held in the *1-800-AMERITECH Order*, these competitive advantages could reduce U S WEST's incentive to open its local market to competition and, thus, run counter to Congress's intent in enacting section 271.⁵¹²

For the third time, the Commission found that Qwest had undertaken to provide interLATA services with the specific intent of undercutting the foundation of section 271.

Current Violation Of Section 271. While this pattern of past adjudicated violations of section 271 should cause ample Commission concern, Qwest's continuing violations of section 271 are even more troubling. Specifically, in violation of section 271 and the merger conditions that were imposed on Qwest's merger with US WEST (the "Merger"), Qwest continues to provide prohibited interLATA services. These violations are documented in proceedings that surround audit reports filed by Qwest required by conditions on the Merger.⁵¹³

Qwest has employed three separate schemes, each of which is patently unlawful: it has used lit fiber capacity IRUs,⁵¹⁴ it has provided interLATA services to customers under the guise of "corporate communications,"⁵¹⁵ and, most brazenly, it has directly provided interLATA services "billed and *branded* as Qwest services."⁵¹⁶ As AT&T demonstrated in the audit proceedings following the Merger, the post-merger lit fiber capacity IRU arrangements neither were, nor could

⁵¹² *Id.* ¶ 19.

⁵¹³ Two complaints also have been filed by Touch America, Inc. ("Touch America") against Qwest that relate to the violations documented in the audits filed pursuant to the Merger conditions. See Complaint, *Touch America, Inc. v. Qwest, Communications International, Inc.*, File No. EB-02-MD-003 (Feb. 2002) ("*IRU formal complaint*") and Complaint, *Touch America, Inc. v. Qwest, Communications International, Inc.*, File No. EB-02-MD-004 (Feb. 11, 2002) (revised and refiled March 1, 2002) ("*Divestiture formal complaint*").

⁵¹⁴ Letter from Arthur Anderson LLP to Dorothy Attwood (June 6, 2001), Finding 7 ("June 6, 2001 Supplemental Letter") (found with respect to 14 of 92 in-region service component codes sampled).

⁵¹⁵ *Id.*, Finding 2 (11 of the 458 account records were identified as providing prohibited in-region service in this manner).

⁵¹⁶ Report of Independent Accountants, Att. 1 at 1 (April 16, 2001) ("*Initial Auditor's Report*") (emphasis added); see also *id.* (for 266 customers with associated revenues from July 2000 through March 2001 in excess of \$2.2 million); June 6, 2001 Supplemental Letter, Finding 9 (Qwest paid touch America only \$856,863 out of \$2,212,730 billed under for in-region interLATA services sold under Qwest's brand).

have been, approved in the *Qwest Merger Orders* and flatly violate section 271.⁵¹⁷ Moreover, the accounting practices employed as part of these efforts in part may have placed Qwest's questionable arrangements under the public microscope for careful scrutiny.⁵¹⁸ As reported in the New York Times:

Qwest Communications International, the dominant provider of local telephone service in 14 Western states, said last night that it had incorrectly accounted for more than \$1.1 billion of transactions from 1999 to 2001 in the latest revelation of accounting irregularities at a telecommunications company.

Qwest also said that its accounting problems might extend to areas beyond the sale of fiber optic capacity, where most scrutiny had been focused until recently. . . . Qwest's business practices were already under investigation by the S.E.C. and the Department of Justice.⁵¹⁹

While the extent and nature of the relationship between Qwest's improper accounting and its entry into "capacity lease" arrangement is currently unclear, there can be no doubt that the Commission must examine Qwest's compliance with Section 271 with respect to these issues. Specifically, in order to bring the Qwest-US WEST merger into compliance with Section 271, Qwest committed to divesting its interLATA operations in the US WEST region to an "independent" competitor, Touch America. The Commission accepted Qwest's and US WEST's representations that Touch America would not be dependent upon or controlled by Qwest and, therefore, that Qwest post-merger would not be "providing" interLATA services in violation of section 271. There is now substantial evidence that Qwest concealed a number of steps that it took to ensure that Touch America would remain dependent on Qwest in providing services to divested customers. Apparently, immediately after the "divestiture," Qwest undertook a concerted campaign to reacquire the most

⁵¹⁷ Memorandum Opinion and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376 (2000) ("March 10 Merger Order"); Memorandum Opinion and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 11909 (2000) ("June 26 Merger Order") (collectively the "Qwest Merger Orders").

⁵¹⁸ See "Qwest Finds Problem With \$1.1 Billion in Transactions," Simon Romero, *New York Times*, July 29, 2002, at B1. See also Yahoo - *Qwest Communications Provides Current Status of Ongoing Analysis of Its Accounting Policies and Practices*, http://biz.yahoo.com/prnews/020728/lasu003_1.html.

valued divested customers and to provide them (and others) with prohibited in-region interLATA services.

Although Qwest assured the Commission during the Merger proceedings that Touch America would be independent of Qwest when providing in-region interLATA service,⁵²⁰ it plainly was not. Qwest, for example, assured the Commission that it would provide Touch America with sufficient access to Qwest databases so that it could support the in-region service customers being divested to it,⁵²¹ but as explained by Touch America, “Qwest has exercised such control over the data systems and software as to prevent Touch America from independently operating or servicing Transferred Customers.”⁵²² Qwest similarly assured the Commission that under the Bilateral Wholesale Agreement, Touch America was not required to purchase out-of-region capacity on a wholesale basis from Qwest,⁵²³ Touch America now says that Qwest’s undisclosed billing system structure precluded Touch America from billing the transferred customers if it used a third party off-net provider for out-of-region capacity.⁵²⁴ Qwest also represented to the Commission that it would lease to Touch America four circuit switches,⁵²⁵ but Touch America has now disclosed that this did not occur and that Touch America was granted only limited functionality that did not provide it “with the kind of operational control over the switches that would allow Touch America to perform the ‘core functions’ associated with the operational management of a switch.”⁵²⁶ Just as significantly, Qwest did not disclose to the Commission its “lit fiber” “Indefeasible Rights of Use” (“IRUs”) agreement

⁵¹⁹ *Id.*

⁵²⁰ See, e.g., Qwest’s Divestiture Compliance Report, at 18 (April 14, 2000) (“*April 14, 2000 Divestiture Plan*”) (that under the Divestiture Plan “Qwest has further protected Touch America’s ability to maintain a viable independent business within the region without restricting Touch America’s ability to grow its business for national accounts”); see also *id.* at 12 (“Touch America is a strong and independent carrier that has the financial capacity and operational experience to provide excellent service to the customer base that Qwest will be divesting”).

⁵²¹ *Id.* at 40-41.

⁵²² Divestiture Formal Complaint ¶ 193.

⁵²³ “Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report,” Attachment A to Qwest’s Reply Comments, at 20-21 (May 12, 2000) (“*Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report*”).

⁵²⁴ Divestiture formal complaint ¶¶ 306-307.

⁵²⁵ April 14, 2000 Divestiture Plan at 4, 19-20, 42.

⁵²⁶ Divestiture formal complaint ¶ 282; see generally *id.* ¶¶ 272-292.

with Touch America, although it contemplated the need for such an agreement even before it submitted its Divestiture Plan and began “negotiations” with Touch America weeks before the Commission issued its *Order* approving the Merger. Under this agreement, Touch America was required to pay Qwest for leasing interLATA network facilities *owned and operated by Qwest* in order to provide retail services to Touch America’s “customers.”

Qwest used these schemes as part of a winback strategy for large customers to replace private line services provided by Touch America. Thus, as set forth in Touch America’s complaints, Qwest was able to reacquire Teleglobe, which was receiving leased line private line service from Touch America, by offering it lit fiber capacity IRUs.⁵²⁷ Similarly, in March 1998 Qwest announced a 15-year pre-paid private line service arrangement with Verio.⁵²⁸ Verio was then divested to Touch America and reacquired by Qwest with lit fiber capacity IRUs.⁵²⁹ Touch America identified four other private line customers reacquired by Qwest using lit fiber capacity and alleges that a number of government accounts were also affected.⁵³⁰

The Arizona InterLATA Gambit. As a final note on its anti-section 271 efforts, it must be recognized that Qwest’s efforts began in Arizona, where US WEST attempted to make an “end-run” around the interLATA restrictions and provide long distance service there without opening its local market to competition. Specifically, Qwest sought to remove the LATA boundary within Arizona by asking that the ACC abolish the boundary. Once the LATA boundary was gone, Qwest believed it could provide telephone service throughout the state because such service would not be “interLATA service” within the prohibitions of Section 271.

⁵²⁷ IRU formal complaint ¶¶ 75, 78.

⁵²⁸ See Verio Form S-1/A filed on May 8, 1998, Exhibit 10.25, <http://www.sec.gov/Archives/edgar/data/1040956/0000950134-98-003922.txt> (“*Verio/Qwest Capacity Service Agreement*”)

⁵²⁹ IRU formal complaint ¶¶ 53-54.

⁵³⁰ *Id.* ¶¶ 26-80. There is likewise considerable evidence that Qwest has been using in-region interLATA “corporate communications” in violation of Section 271. *Divestiture formal complaint* ¶¶ 338-40, 350-54, 431-46, 506. Touch America’s complaints allege that Qwest has in fact been using its “corporate communications” to provide ordinary telecommunications services to unaffiliated third parties and that these services are not permissible Official Services or incidental interLATA services. All three audit reports filed by Qwest reveal that it has, in addition to these “stealth” in-

The Commission was understandably quite concerned with these efforts to commit a “willful and knowing violation of the Act and the Commission’s rules.”⁵³¹ The Chief of the Commission’s Common Carrier Bureau took the unusual course of writing to US WEST, stating the Commission’s particular concern with expressions by US WEST representatives that the Commission lacked authority over in-state LATA boundaries and that US WEST could “provide telecommunications services across current LATA boundaries in Arizona without first applying to, and receiving approval from,” the Commission for LATA boundary modifications. The Commission’s concern rose to such a level that it required US WEST to provide a “written commitment” that it would not “begin to offer any telecommunications services across current LATA boundaries prior to receiving authority to do so from the FCC.” In taking such an unusual step, the Commission appears to have been prescient with respect to Qwest/US WEST’s propensity to compete in the provision of interLATA services without first opening its local exchange markets.

4. Qwest’s Other Anticompetitive Conduct

Inhibiting Entry. AT&T demonstrated above its need to resort to legal recourse in the effort to compel Qwest to provide AT&T with rightful entry into the local markets in Washington and Minnesota. Other CLECs, in various Qwest states, have raised similar issues concerning Qwest conduct that inhibits entry into the local exchange market. Some of these complaints have been withdrawn pursuant to confidential settlements that may involve agreements that should have been filed, but were not made public as required by Section 252. For example, SunWest Communications engaged in litigation with Qwest in August, October and November of 2000, alleging that Qwest, among other things, failed to provide interconnections in a timely manner. Qwest and SunWest entered into a confidential settlement of SunWest’s complaint. Additionally, Rhythms Links, Inc., also filed a complaint against Qwest with the Colorado Public Service Commission regarding

region InterLATA services, also directly provided millions of dollars of *Qwest branded* in-region interLATA services and retained a substantial portion of the revenues from such services.

⁵³¹ Letter, June 1, 1999, from Lawrence E. Strickling, Chief, Common Carrier Bureau, to Mr. Bruce K Posey (Attachment 13 hereto).

Qwest's discriminatory practices in offering ADSL- capable loops and ISDN-capable loops to CLECs.⁵³² In response and in settlement, Qwest began providing an ADSL-capable and an ISDN-capable loop to CLECs, but took nearly a year and impeded Rhythms' market entry throughout the Qwest region.⁵³³ Scindo Networks similarly filed a complaint in Colorado, alleging that Qwest had repeatedly and intentionally violated the terms of its interconnection agreement on issues concerning collocation, dark fiber, and processing delays. Scindo Networks complained that Qwest's actions were intended to thwart competition from broadband competitors. According to a Stipulation for Dismissal, filed with the Commission on May 4, 2001, Qwest and Scindo Networks have entered into a confidential settlement regarding the complaint.

Freezing Service. Finally, Qwest has taken other roads to entrench its dominant position in the local markets it serves. For example, Qwest has been ordered by the Iowa Board to cease its practice of freezing local service changes.⁵³⁴ In response to a formal complaint filed by Cox Iowa Telecom, LLC ("Cox Iowa"), the Iowa Board investigated the need for Qwest's newly adopted policy freezing the switching of local service. The Board found only 14 confirmed cases of local slamming in Iowa in the one-year period that preceded Qwest's action, and concluded that given "the negligible state of local competition in Iowa and the few instances of local service slamming," the "local service freeze implemented by Qwest" at that time was "unnecessary to protect consumers" and would "have a detrimental effect on local competition."⁵³⁵ Despite the action in Iowa, Qwest has maintained the policy of attempting to institute local service freezes in other states, and on March 29, 2002, AT&T was required to file a complaint with the Washington Utilities And Transportation Commission about

⁵³² See *Before the Public Utilities Commission For The State Of Colorado*, Rhythms Links Inc. (Complainant) v. U S West Communications, Inc. (Respondent), No. 99F-493T, October 7, 1999.

⁵³³ Before the Public Service Commission of the State of Utah, *In the Matter of the Application of U S WEST Communications, Inc. For Approval Of Compliance With 47 USC § 271(d)(2)(B)*, Docket No. 00-049-08, Affidavit of Valerie Kendricks, Rhythms Links, Inc., March 23, 2001, pp. 2-4.

⁵³⁴ *Cox Iowa Telecom, LLC v. Qwest Corporation*, Docket No FCU-02-1, released April 3, 2002 (Attachment 14 hereto) at 9.

⁵³⁵ *Id.* at 6, 8.

Qwest's practice of adding local freezes to Qwest local service accounts.⁵³⁶ As a result of Qwest's unilateral actions, customers were unable to switch to AT&T Broadband local service due to freezes on their accounts, even though the majority of customers asserted that they never authorized the freeze.

In fact, Qwest has a history of adopting anticompetitive freezes. In Colorado in February 1999, Qwest unilaterally extended PIC freezes (known as "jamming"). Qwest implemented this "PIC freeze extension" the day that intraLATA presubscription was implemented in Colorado – the first time that customers were able to choose their intraLATA carrier. Prior to intraLATA presubscription, and at the time that Qwest extended the preferred carrier freeze, customers in Qwest's service territory had no choice regarding the carrier that carried their intraLATA toll calls that were dialed direct from their line. All such calls were carried by Qwest. By extending the freeze to the intraLATA carrier, Qwest froze *itself* as the customers' carrier, thus negating the customers' ability to choose a carrier other than Qwest. Qwest rejected thousands of customers' orders to switch away from Qwest. AT&T, MCIWorldcom, and Nextlink all filed complaints regarding Qwest's action, and an ALJ found that the institution of the freeze violated Colorado law.⁵³⁷ The Commission found that "USWC used its position as the sole 1+ intraLATA provider in its extensive service area to inhibit the entry of competitors into the intraLATA market and tangibly damaged the entering competitors."⁵³⁸ The Commission also found that "USWC's abuse of its market position to inhibit and damage competition was anticompetitive."⁵³⁹

In short, Qwest's pervasive efforts to avoid compliance with sections 251 and 252, when coupled with its past and ongoing violations of section 271, should provide the Commission with a strong conviction that Qwest is committed to entering the long distance market without committing

⁵³⁶ *AT&T Corp. v. Qwest Corporation*, WUTC Docket UT-020388.

⁵³⁷ See *Before the Public Utilities Commission of the State of Colorado*, Docket No. 99K-193T, Decision No. C00-301, March 22, 2000, citing Section 40-2-103. C/R/S/ as well as 4 *Code of Colorado Regulations* 723-25 ("Rule 25").

⁵³⁸ *Id.* I.(E.)(2.).

⁵³⁹ *Id.*

itself to opening up its local markets. The Commission cannot be confident that Qwest will continue to open its local markets if the Commission grants Qwest section 271 authority in its currently pending nine-state onslaught.

C. Qwest Maintains Monopoly Power Over Residential Service.

Given the extensive pattern of Qwest noncompliance with the Act and its efforts to stall or prevent competition, it is not surprising that Qwest retains monopoly power over residential service in the four states covered by its application. In reviewing actual competition in the local market, the Commission reviews the extent to which new entrants “are actually offering” local service to both business and residential customers through each of the three means offered by the Act.⁵⁴⁰ The “Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent’s network, and resale.”⁵⁴¹ As the Commission has recognized, its public interest analysis “must include an assessment of whether all procompetitive entry strategies are available to new entrants.”⁵⁴² And, as the Commission explained in the *Michigan 271 Order*, “[t]he most probative evidence that all entry strategies are available would be that new entrants *are actually offering* competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent’s network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).”⁵⁴³ In subsequent applications, the Commission has repeatedly considered the degree to which competitors have actually succeeded in offering local telecommunications services using the different entry strategies prescribed by the Act.⁵⁴⁴

⁵⁴⁰ *Michigan 271 Order* at ¶ 391.

⁵⁴¹ *Id.* ¶ 96.

⁵⁴² *Id.* at 387.

⁵⁴³ *Id.* ¶ 391 (emphasis added).

⁵⁴⁴ See, e.g., *New York 271 Order* ¶¶ 13-14; *Texas 271 Order* ¶¶ 5-6.

Here, Qwest's own data – particularly after Qwest's over-estimate of CLEC facilities-based lines is corrected – confirm that facilities-based and UNE-based entry is extremely limited or non-existent in Qwest's service territories. Qwest relies on two methods to estimate facilities-based entry – one using E911 data, and a second using local interconnection service (“LIS”) trunk data.⁵⁴⁵ Both of Qwest's methods overstate facilities-based entry.

First, Qwest's use of an E911 database to estimate CLEC line counts is inaccurate for many reasons. For example, AT&T's protocol is to report to the E911 database *every* telephone number behind a PBX switch, including direct inward dial (“DID”) numbers, when a customer migrates from an ILEC to AT&T. Because AT&T does not know which ported telephone numbers are DID numbers, AT&T routinely loads *all* telephone numbers into the E911 database to ensure that the database includes all lines that are necessary for prompt emergency response. This practice results in the E911 database including a substantially larger number of telephone numbers than the actual facilities needed to provide the service. *See* Lancaster-Morganstern Reply Dec. (filed in UNE Triennial Review proceeding) ¶ 12.⁵⁴⁶ Area code overlays can also cause CLEC lines to be overstated, because in such circumstances CLECs often load numbers from *both* area codes into the E911 database to ensure emergency response. *See id.* ¶ 13. Further, ILECs and CLECs follow a wide variety of methods when submitting numbers to E911 databases, and as a result the E911 databases do not provide a more accurate count of CLEC lines than the Commission's Form 477 information, in which all parties follow the same methodology. *See id.* ¶ 10.

Second, it is clear that Qwest's estimate based on trunk data is inflated. In order to estimate facilities-based lines served by CLECs, Qwest multiplies the number of LIS trunks by a factor of 2.75.⁵⁴⁷ In support of the 2.75 factor, Qwest cites SBC's use of the same factor in SBC's 271

⁵⁴⁵ Teitzel Decl. ¶¶ 32-37.

⁵⁴⁶ AT&T's Network engineering standards allow for up to 500 DID telephone numbers for each T-1 facility purchased by a customer. AT&T may not include DID numbers when a customer uses telephone numbers from a block of numbers assigned to AT&T because AT&T has specific information on which numbers are only DID.

⁵⁴⁷ Teitzel Decl. ¶ 36.

applications for Texas, Kansas and Oklahoma.⁵⁴⁸ What Qwest fails to mention is that SBC's use of the 2.75 factor was flatly *rejected* by the Department of Justice as "much too high":

"Although we believe it is reasonable to use the number of interconnection trunks in order to estimate the number of CLEC access lines, SBC's factor of 2.75 appears to be much too high. A more reasonable multiplier, in our view, would be close to one"⁵⁴⁹

Using the data presented by Qwest witness Teitzel – but using the "more reasonable multiplier" of one to estimate CLEC facilities-based lines, Tables 1 through 8 (set forth in Attachment 15) show the amount of CLEC competition in the four states.⁵⁵⁰ The Tables show that less than 2% of *all* switched access lines in Montana (Table 1), Utah (Table 5) and Washington (Table 7) are served by UNE-based competitors. Similarly, less than 3% of all switched access lines are served by facilities-based competitors in Montana (Table 1) and Wyoming (Table 9). There is even less competition for *residential* service. In three of the four states, less than 1/10 of 1% of residential lines in Qwest's service territory are served by UNE-based competitors, with only 24 residential lines in Montana (Table 2), 183 such lines in Utah (Table 4), and 1,688 such lines in Washington (Table 6) served by UNE-based competitors.

Furthermore, even these minuscule shares present an overly optimistic picture of the likely future of CLEC competition in the five states. As reflected in Attachment 16, many of the facilities-based CLECs identified as competitors by Qwest have gone, or are going, out of business, or are in severe financial distress at the present time.⁵⁵¹ The prospects for increased UNE-based competition

⁵⁴⁸ *Id.*

⁵⁴⁹ DOJ Texas Evaluation at n. 15 (February 14, 2000).

⁵⁵⁰ According to the Tables (Attachment 15 hereto): In Montana, facilities-based CLECs have 2.5% and 2.0%, UNE-based CLECs have 1.1% and 0.0%, and resale CLECs have 2.6% and 2.3% of the total and residential lines, respectively. In Utah, facilities-based CLECs have 7.6% and 7.4%, UNE-based CLECs have 1.8% and 0.0%, and resale CLECs have 0.8% and 0.2% of the total and residential lines. In Washington, facilities-based CLECs have 7.6% and 3.6%, UNE-based CLECs have 1.9% and 0.0%, and resale CLECs have 1.1% and 0.5% of the total and residential lines. In Wyoming, facilities-based CLECs have 1.4% and 0.4%, UNE-based CLECs have 10.6% and 3.6%, and resale CLECs have 0.9% and 0.3% of the total and residential lines.

⁵⁵¹ See also Teitzel Decl., Exhibits DLT-Track A/PI-MO-4; DLT-Track A/PI-UT-4; DLT-Track A/PI-WA-4; DLT-Track A/PI-WY-4.

are also bleak, because entry into residential service will be impaired so long as UNE rates remain above a level that permits competitive entry.

If Qwest actually offered CLECs non-discriminatory access to the full economies of scale in its network, the Commission would see meaningful entry and competition from UNE-based entrants. Since the passage of the Act, however, all CLECs combined in Montana, Utah and Washington have managed to gain just a handful of UNE-based residential. The microscopic level of UNE-based entry in these states confirms that Qwest's failure to offer non-discriminatory access to UNEs has severely impaired competitive entry.

Finally, resale is an inherently limited competitive vehicle, both because resale-based competitors cannot alter the nature of the service they are reselling (and thus cannot provide competitors with innovative or improved services), and because resale is priced in a manner that precludes its use in all but the most selectively chosen circumstances.⁵⁵² The record thus shows that resale is not a growing, viable source of future competition for Qwest in the four states, and that no entrant has yet succeeded in using either UNEs or facilities to offer competitive local residential service.

D. Qwest's UNE Rates Preclude UNE-Based Entry.

The evidence shows that Qwest's UNE rates are so high that they preclude efficient local entry. Specifically, those rates effect a price squeeze that prevents UNE-based competitors from earning sufficient margins to provide local service economically in competition with Qwest, by imposing wholesale costs on Qwest's competitors that render it impossible for them to offer a retail service that would be price competitive.⁵⁵³

⁵⁵² The avoided cost discount has proved inadequate to provide CLECs a basis for profitable entry for most consumers. For example, as monopolists, the incumbents do not face (and therefore do not "avoid") the huge customer acquisition costs that CLECs confront. Nor does avoided cost pricing take into account the lack of economies of scale that a new entrant must address. And CLECs providing resale do not benefit from access revenue. For all of these reasons, CLECs seeking to provide a broad-based, significant competitive alternative to the incumbents' local residential monopoly cannot do so through the resale of local service.

⁵⁵³ See Lieberman/Pitkin Decl. ¶¶ 50-54.

As discussed above, Section 271 bars the Commission from granting Qwest long distance authority unless the Commission finds that the UNE rates are “nondiscriminatory” as well as cost-based.⁵⁵⁴ Because Section 271 categorically bars long distance authorization unless Checklist Item Two has been “fully implemented,” to the extent that Qwest’s UNE rates in any state are discriminatory, the Application must be denied.

Qwest’s imposition of rates that foreclose broad-based local competition not only establishes that those rates violate Checklist Item 2 because they are discriminatory, but also establishes that granting the application could not be consistent with the “public interest.” 47 U.S.C. § 271(d)(3)(C). The Commission has held that the “public interest” prong of Section 271 requires it to “ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open.”⁵⁵⁵ The central purpose of section 271 is to ensure that local telephone markets in a state are open to competition – and that competing carriers therefore have the legal and economic ability to provide competing local services – before a BOC in that state is permitted to provide long-distance services. A price squeeze that would foreclose efficient local entry into the residential market obviously constitutes such a “relevant factor.” And proof that such a factor in fact exists demonstrates conclusively that the market is not – and cannot be – open.

Despite the nondiscrimination and public interest provisions of Section 271, the Commission had previously held that it need not consider evidence of a price squeeze in evaluating a section 271 application. That holding was based on the Commission’s view that such evidence was “irrelevant,” and that considering it would improperly involve the Commission in the process of setting local retail

⁵⁵⁴ See 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A).

⁵⁵⁵ *Kansas/Oklahoma 271 Order* ¶ 267. The Supreme Court has explained that the statutory term “public interest” “take[s] [its] meaning from the purposes of the regulatory legislation.” *NAACP v. FPC*, 425 U.S. 662, 669 (1976). As the Commission has held, Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a time when their local monopolies would give them an “unfair advantage” over long distance competitors in, *inter alia*, providing “combined packages” of local and long distance service to customers who desire “one-stop shopping.” *AT&T v. Ameritech*, 13 F.C.C. Rcd. 21438, ¶¶ 5, 39 (1998), *aff’d sub nom. U S WEST v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999). If, by contrast, long-distance entry were allowed before other carriers could provide competing combined packages, it would “threaten competition” in both the local and the long-distance markets by granting the BOC a monopoly in the provision of such combined services. *Id.* ¶ 5.

rates that are outside its jurisdiction.⁵⁵⁶ But the United States Court of Appeals for the D.C. Circuit, relying on the Supreme Court’s decision in *Conway*, has now squarely rejected that view.⁵⁵⁷ Indeed, because the central purpose of the 1996 Act is “stimulating competition,” the D.C. Circuit held that the “public interest” analysis under section 271 may weigh even “*more heavily* towards addressing potential ‘price squeeze’” than was required under the Federal Power Act in *Conway*.⁵⁵⁸ Under *Sprint v. FCC*, therefore, when evidence is presented in a section 271 proceeding that UNE-based residential competition is economically infeasible, the Commission cannot grant that application without evaluating and addressing that evidence. Unless the Commission rejects this application on other grounds, it must develop and apply a framework for analyzing AT&T’s claims.

This interpretation has gained added force from the Supreme Court’s decision three months ago in *Qwest Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1661 (2002). The 1996 Act, noted the Court, represented the “first time” in which “Congress passed a ratemaking statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities’ monopolies vulnerable to interlopers, *even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets.*” *Id.*, 122 S.Ct. at 1661 (emphasis added).

In the face of *Sprint v. FCC*, the *Vermont 271 Order* (§ 67), advancing three purported distinctions, suggests that *Conway* may be inapplicable in this context. As *Sprint v. FCC* makes clear, however, the court that reviews the Commission’s section 271 decisions has concluded that *Conway* is controlling here. In any event, the suggested distinctions that the Commission has raised are specious. The first two distinctions cited by the Commission—that UNEs, unlike the electricity at issue in *Conway*, are not “undifferentiated commodities” and have prices that may vary by retail-

⁵⁵⁶ *Kansas/Oklahoma 271 Order* ¶ 92.

⁵⁵⁷ *Sprint v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

⁵⁵⁸ *Id.* at 564 (emphasis added). Moreover, the *Sprint* Court also confirmed that the Commission’s lack of jurisdiction over retail rates was no bar to such an analysis, because the Commission can respond to a price squeeze without disturbing retail rates. Instead, because the Commission has said that TELRIC rates exist within a “band,” one entirely permissible solution is to “‘fix[] the wholesale rates, which [a]re under its jurisdiction, at a lower level within” that band. *Id.* at 564 (citing *Conway*, 426 U.S. at 279). Here, because, as AT&T has shown, Qwest’s rates are not TELRIC-compliant to begin with, there is certainly plenty of room for downward movement.

customer location—do not in any way blunt the force of the legal rule set forth in *Conway*: where a price squeeze is demonstrated, wholesale rates are discriminatory and contrary to the public interest. The existence of price variations (and product “differentiation”) may, of course, impact the calculations to determine *whether* a price squeeze exists (and AT&T’s margin analyses do, indeed, account for geographic rate and cost differences). But if, accounting for these rate and cost differences, a price squeeze is shown to exist, *Conway* applies with full force in this context, as the D.C. Circuit has recognized. It is also not relevant that “intentional state policy” may have caused wholesale rates to exceed retail rates. AT&T does not ask the Commission to interfere with (or even comment upon) state policy, but merely to determine whether a price squeeze exists and, if so, to decide whether it would serve the public interest to grant a section 271 application notwithstanding the price squeeze. As explained above, where local markets are not open to competition, granting section 271 authority will necessarily permit a BOC to extend its local monopoly into markets for bundled local and long distance service. The fact that “intentional state policy” may have contributed to the local monopoly does not make the leveraging of that monopoly consistent with the public interest. As explained by the Supreme Court three months ago, “[t]he Act . . . appears to be an explicit disavowal of the familiar public-utility model of rate regulation . . . presumably still being applied by many States for retail sales, . . . in favor of novel rate setting designed to give aspiring competitors every possible incentive to enter local retail telephone markets.”⁵⁵⁹

As other courts have recognized, implicit subsidies – “that is, ‘the manipulation of rates for some customers to subsidize more affordable rates for others’” – are fundamentally incompatible with efficient competition. *See Alenco Communications Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999). Accordingly, Section 254(d) expressly authorizes state commissions to adopt universal service mechanisms to convert intrastate implicit subsidies into explicit subsidies. *See* 47 U.S.C. § 254(f). To

⁵⁵⁹ *See Qwest v. FCC*, 122 S. Ct. 1646, 1661 (2002).

be sure, some states have chosen for policy reasons of their own to maintain the pre-existing system of implicit subsidies, and have thus far declined to establish a competitively neutral system of explicit subsidies. To the extent that those policies facilitate a price squeeze, however, Section 271 precludes the Commission from granting interLATA authority in that state. And there is no rational basis for the Commission to disregard its public interest and nondiscrimination mandates and to reward state commissions and RBOCs that choose to maintain competition-foreclosing regulation that is contrary to the terms and core competitive purposes of the 1996 Act.

The third purported distinction cited by the Commission – the availability of resale – is also unavailing. As AT&T has repeatedly shown, and demonstrates again here, resale requirements do not solve the price squeeze because, *inter alia*, the wholesale discounts available are also too small to allow profitable entry.⁵⁶⁰ And, as explained above, the margin analysis performed by Michael Lieberman and Brian Pitkin assumes that local entrants will engage in resale activities where higher margins are available from providing resale than from providing services on a UNE-P basis. That analysis shows that, even accounting for resale opportunities, statewide net margins in Montana and Washington are negative.⁵⁶¹

Notwithstanding its reservations about the applicability of *Conway*, in its *Vermont 271 Order* (¶ 71), the Commission also offered guidance on the type of “margin analysis” that should be employed to test whether a BOC’s rates results in an anticompetitive price squeeze. The Commission

⁵⁶⁰ In a footnote, Qwest advances a fourth argument in an attempt to distinguish *Conway*: “a true price squeeze in the antitrust sense can only arise where a firm charges more than a ‘fair price’ for an essential input. [Citations omitted] . . . ILECs can hardly be said to sell their UNEs at ‘unfair’ prices because these prices are regulated . . . and indeed are based on TELRIC . . .” Br. 188 n.102.

As an initial matter, Qwest misstates the applicable antitrust decisions. For example, *Alcoa* holds that a firm with monopoly control over an input essential to the provision of a finished product is engaged in a price squeeze and is not charging a “fair” input price if purchasers of the input cannot make a “living profit” from sale of the finished product – as purchasers of UNEs plainly cannot in Montana, Utah, Washington and Wyoming. *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-38 (2d Cir. 1945). Moreover, as described above, in *Conway*, the Supreme Court has held that even if a utility’s wholesale rates are within the range of reasonable cost-based rates, the rates are “discriminatory” and “anticompetitive” if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility’s retail services to any class of customers. Thus, if Qwest’s high-end UNE rates foreclose UNE purchasers from economically providing residential competition, Qwest is engaged in “discrimination” and has not satisfied checklist item two.

⁵⁶¹ See Lieberman/Pitkin Decl. ¶ 52.

explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis including, intraLATA toll and interLATA toll revenue contributions, and the amount of federal and state universal service revenues that would be available to new entrants.⁵⁶² The Commission also stated that a margin analysis should consider whether entry is viable using a mix of a UNE-based and resale-based local entry strategy.⁵⁶³

AT&T has conducted such an analysis. It demonstrates that a residential entry strategy that employs combination of UNE-based and facilities-based entry (the analysis assumes that a UNE-based approach where that is the most profitable entry mode, and a resale-based approach where that is the most profitable mode of entry) is *not* economically feasible in Montana or Washington. The state-wide average *gross* margin (not accounting for carriers' internal costs) in Montana is \$4.26 and in Washington is \$6.09⁵⁶⁴ – margins which do not even come close to covering an efficient carrier's internal costs of entry.⁵⁶⁵ Because the *net* margins that are available to new entrants in all these states are *negative*, competitive entry is not feasible in Montana, Utah, Washington and Wyoming. Thus, approval of Qwest's Application is not consistent with the public interest.

E. Qwest's Performance Remedy Plans Are Inadequate To Demonstrate 271 Compliance.

The current record provides no basis for Qwest's claims that its performance enforcement plans will serve as effective deterrents against future backsliding.

There is no factual basis for Qwest's claims that its performance remedy plans contain a comprehensive set of self-executing remedies demonstrating that it will continue to provide CLECs with nondiscriminatory service in the wake of any Section 271 relief. Performance monitoring and enforcement mechanisms can "constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry would be consistent with the public interest."⁵⁶⁶ But the

⁵⁶² See *Vermont 271 Order* ¶ 71.

⁵⁶³ See *id.* ¶ 69.

⁵⁶⁴ See Lieberman/Pitkin Decl. ¶ 53.

⁵⁶⁵ See Bickley Decl. ¶ 2-24.

⁵⁶⁶ *New York 271 Order* ¶ 429. See also *Massachusetts 271 Order* ¶ 236; *Kansas/Oklahoma 271 Order* ¶ 273.

Commission has made clear that, when an applicant relies on a performance monitoring and enforcement plan to support its application, it will review the contours of that plan to assess whether it provides sufficient incentives for compliance with Section 271, stating:

Where, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving Section 271 authorization, *we will review the mechanisms involved to ensure that they are likely to perform as promised. While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance.*⁵⁶⁷

Moreover, the Commission has identified certain key elements in a legitimate performance monitoring and enforcement plan. Thus, in the New York 271 Order, the Commission endorsed the New York performance assurance plan because it contained the following characteristics: (1) “potential liability that provides a meaningful and significant incentive to comply with the designated performance standards”; (2) “clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance”; (3) “a reasonable structure that is designed to detect and sanction poor performance when it occurs”; (4) “a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal”; and (5) “a reasonable assurances that the reported data is accurate.”⁵⁶⁸

Similarly, in its subsequent decisions reviewing Section 271 applications, the Commission has evaluated each performance remedy plan at issue based upon these same characteristics.⁵⁶⁹ Qwest’s performance monitoring and enforcement mechanisms do not and cannot satisfy these criteria.

⁵⁶⁷ New York 271 Order ¶ 433 (emphasis added). See also Texas 271 Order ¶ 423; Kansas/Oklahoma 271 Order ¶ 273.

⁵⁶⁸ New York 271 Order ¶ 433.

⁵⁶⁹ See Texas 271 Order ¶¶ 424-429; Kansas/Oklahoma 271 Order ¶¶ 273-278; Massachusetts 271 Order ¶¶ 240-247; Connecticut 271 Order ¶¶ 76, 77.

No anti-backsliding plan can be effective unless it is based upon a system of comprehensive and performance measurements producing accurate and reliable performance results that are coupled with enforcement mechanisms that can effectively deter Qwest from engaging in anticompetitive conduct. These conditions do not presently exist.

In this regard, all of the performance remedy plans on which Qwest relies are fundamentally flawed because Qwest's performance data that serve as the basis for the calculation of remedies payments are inaccurate and untrustworthy. Because the performance data which serve as the springboard for remedies payments are inaccurate, they fatally compromise the efficacy of the performance remedy plans. Even if Qwest's data were accurate, reliable and comprehensive – and they are not – the very structure of Qwest's remedy plans in each State included in the Applications render them ineffective tools to deter anticompetitive conduct after any section 271 entry.⁵⁷⁰

Contrary to Qwest's claim, the performance remedy plans are flawed in both their comprehensiveness and ability to capture actual performance. The performance remedy plans cannot possibly capture Qwest's actual performance because they omit measures that are necessary to detect discriminatory performance. The omitted metrics – which include measures on service order accuracy and functional acknowledgments – are neither trivial nor insignificant. Because the current performance remedy plans exclude these measures, Qwest will suffer no financial consequences for plainly discriminatory conduct.⁵⁷¹

More fundamentally, Qwest's Application for authority to provide long distance services in Wyoming is premature because there is *no* performance plan presently in place in Wyoming. As this Commission has recognized, "in all of the previous applications granted to date, the applicant was subject to an enforcement plan administered by the relevant State Commission to protect against backsliding after BOC entry into the long distance market."⁵⁷² Undaunted by that precedent, Qwest

⁵⁷⁰ Finnegan Decl. ¶¶ 201-203.

⁵⁷¹ *Id.* ¶¶ 204-205.

⁵⁷² *Pennsylvania 271 Order* ¶ 127 n. 439.

has circumvented the State process and invited this Commission to approve its proposed plan – a defective plan that the Wyoming PSC squarely rejected, finding that it is contrary to the public interest.⁵⁷³ This Commission must and should reject that invitation.

Aside from these deficiencies, other provisions in Qwest’s performance enforcement plans fail to provide sufficient incentives to assure that Qwest will fulfill its statutory obligations. In this regard, this Commission has recognized the important role that state regulatory agencies must play in monitoring and enforcing a BOC’s compliance with its statutory obligations after Section 271 relief is granted. Indeed, this Commission has emphasized that “state performance monitoring and post-entry enforcement”⁵⁷⁴ mechanisms are “critical complements to the Commission’s authority to preserve checklist compliance pursuant to section 271(d)(6).”⁵⁷⁵

In approving Bell Atlantic’s New York 271 application, the Commission emphasized that the New York PSC was “committed to supervising the implementation of [performance assurance] plans” that were designed to assure that the markets remained open in the wake of Section 271 relief.⁵⁷⁶ Because of the vital role that the New York PSC played and would continue to play in monitoring and adjusting the performance monitoring and remedy plan as needed, this Commission was confident that the New York monitoring and enforcement plan would be revised as needed “to reflect changes in the telecommunications industry and in the New York market.”

However, the Washington and Montana performance remedy plans – which explicitly permit Qwest to challenge the authority of the State to make any changes to the plan – pose a significant risk that CLECs will be faced with protracted litigation whenever the State imposes a change that is not to Qwest’s liking. If Qwest is free to challenge the authority of the State to make changes to the plan,

⁵⁷³ Finnegan Decl. ¶¶ 206-233.

⁵⁷⁴ *Texas 271 Order* ¶ 420, n.1219 (emphasis added); *New York 271 Order* ¶ 429, n. 1316; *Kansas/Oklahoma 271 Order* ¶ 269, n. 828; *Massachusetts 271 Order*, ¶ 236, n. 757.

⁵⁷⁵ *Texas 271 Order* ¶ 420.

⁵⁷⁶ *New York 271 Order* ¶ 12.

Qwest could render the plan a static document that would never evolve at a pace that is consistent with the dynamics in the telecommunications market.⁵⁷⁷

Qwest simply cannot have it both ways. Qwest should not be permitted to rely on a remedy plan for 271 approval, while simultaneously reserving the right to challenge the authority of the state to make any changes to that plan. Moreover, the reservation of such rights undermines the Commission's stated goal of having "self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention."⁵⁷⁸ For all of these reasons, Qwest's performance enforcement plans cannot possibly meet the public interest requirements under Section 271.

⁵⁷⁷ Finnegan Decl. ¶¶ 234-247.

⁵⁷⁸ *Michigan 271 Order* ¶ 394.

CONCLUSION

For the foregoing reasons, Qwest's application for authorization to provide in-region, interLATA services in Montana, Utah, Washington, and Wyoming should be denied.

Respectfully submitted,

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August 1, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2002, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: August 1, 2002
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